Supreme Court, U.S.
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No. 06-400

In The

Supreme Court of the United States

ELLIS C. SMITH,

Petitioner,

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether regulatory interpretations of the Court of Appeals for Veterans Claims, a specialized court established by Congress under Article I as the final Executive Branch authority to review regulations adopted by the Department of Veterans Affairs, are entitled to deference from a reviewing Article III court?

II. Whether the Federal Circuit properly deferred to the Department of Veterans Affairs' interpretation of an ambiguous regulation providing benefits to veterans when that interpretation was narrow and contrary to the interests of veterans?

LIST OF PARTIES

Petitioner was the only claimant-appellee in the court below. Respondent-appellant is R. James Nicholson, Secretary of Veterans Affairs, appellant in the court below.

LIST PURSUANT TO RULE 29.6

Petitioner is an individual; hence, no publicly held entity owns 10 percent or more stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this case on June 19, 2006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (hereinafter "Federal Circuit") is reported at 451 F.3d 1344 (Fed. Cir. 2006) and is reproduced in the appendix at A1a-15a. The opinion of the United States Court of Appeals for Veterans Claims (hereinafter "Veterans Court") is reported at 19 Vet. App. 63 (2005) and is reproduced in the appendix at A16a-52a.

JURISDICTION

The Federal Circuit entered judgment on June 19, 2006. A53a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article I, § 8, cl. 9 of the Constitution grants Congress the power to "constitute Tribunals inferior to the supreme Court." Congress established the Veterans Court pursuant to Article I through 38 U.S.C. § 7251. A54a. The jurisdiction of the Veterans Court is found at 38 U.S.C. § 7252, and its

scope of review is set forth in 38 U.S.C. § 7261. A54a-56a. The Federal Circuit reviews decisions of the Veterans Court under the standard established by 38 U.S.C. § 7292. A56a-57a. All of these statutes, along with Department of Veterans Affairs (hereinafter "VA") regulations 38 C.F.R. §§ 4.25(b), 4.87 (diagnostic code 6260), are reproduced in the appendix at pages A54a-65a.

STATEMENT OF THE CASE

Petitioner is a veteran of honorable service in the United States Army. A2a, 17a. He served in the Republic of Vietnam, where he was exposed to artillery fire. A17a. Like many thousands of other similarly situated veterans, Petitioner suffers from tinnitus[1] in both of his ears as a consequence of his military service. Because the Federal Circuit failed to defer to the Veterans Court's interpretation of a VA regulation, Petitioner and many thousands of other veterans will be denied the disability compensation Congress intended them to have. This Court should grant certiorari for two reasons: to hold that where an Article I Executive Branch court interprets a regulation it is that interpretation that is entitled to deference from the Article III courts; and, to hold that ambiguous regulations, as well as ambiguous statutes, providing benefits to veterans must be construed in favor of veterans.

[1] Tinnitus is "a noise in the ears, such as ringing, buzzing, roaring, or clicking." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1843 (29th ed. 2000).

Petitioner filed a claim with the VA in which he sought, *inter alia*, service connection and disability compensation for tinnitus. A17a. A disability will be service connected if that "disability was incurred or aggravated . . . in line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16). Compensation is a monthly payment "to a veteran because of service-connected disability. . . ." 38 U.S.C. § 101(13). The VA awarded Petitioner service connection for tinnitus in a rating decision dated May 1995. *See* A18a. However, it did not award disability compensation for Petitioner's disability. *Id.*

Petitioner filed a timely appeal to the Board of Veterans' Appeals (hereinafter "Board"). A3a, 18a. The Board modified the original VA decision and awarded Petitioner a ten-percent disability rating. A3a, 19a. The modification was based on an intervening change to the VA *Schedule for Rating Disabilities* (hereinafter "Rating Schedule"). The VA had changed the Rating Schedule to allow a ten-percent rating if service-connected tinnitus was found to be "recurrent." 38 C.F.R. § 4.87 (1999) (diagnostic code 6260). The Board did not decide whether Petitioner's ten-percent rating was for tinnitus in his right ear, left ear, or both.

The VA interpreted the Board's decision as granting Petitioner only one ten-percent rating as compensation for tinnitus in both ears. *See* A19a. Petitioner appealed to the Veterans Court. He argued, *inter alia*, that under 38 C.F.R. § 4.25(b) the VA should have granted him two separate ratings for his tinnitus. Petitioner argued that diagnostic code 6260 unambiguously allowed for service connection and a ten-percent disability rating for tinnitus in either the left or right ear. Therefore, according to Petitioner, tinnitus in both ears entitled a veteran to two separate ten-percent

ratings. The VA argued to the contrary that diagnostic code 6260 clearly and unambiguously did not provide for separate ratings for tinnitus in both ears. A26a-27a. The VA asserted that, where separate ratings were elsewhere allowed, the Rating Schedule, 38 C.F.R. pt. 4 (2002), expressly provided for such dual ratings. A26a-27a. Because diagnostic code 6260 contained no similar express provision for separate ratings, the VA argued that only one disability rating was permitted for tinnitus.

The Veterans Court agreed with Petitioner. The Veterans Court found that the language of the two regulations unambiguously required Petitioner's interpretation; separate ratings for each ear. *Smith v. Nicholson*, 19 Vet. App. 63, 74-75 (2005), *rev'd*, 451 F.3d 1344 (Fed. Cir. 2006). Consequently, the Veterans Court correctly held that when read together, 38 C.F.R. § 4.25(b) and diagnostic code 6260 entitled veterans with service-connected tinnitus in both ears to two separate disability ratings. According to the Veterans Court, section 4.25(b) established the general rule under which the VA rated disabilities. *Id.* Section 4.25(b) reads: "[e]*xcept as otherwise provided* . . . disabilities arising from a single disease entity . . . are to be rated separately." 38 C.F.R. § 4.25(b); A60a-61a. VA regulations also recognize tinnitus as a disease of the "ear," and not of the ears. 38 C.F.R. § 4.87 (2002) (diagnostic code 6260); A63a-65a. The Veterans Court held that the characterization of tinnitus as a disease of the ear "mak[es] the provisions of § 4.25 applicable" to Petitioner's claim. A63a-65a; *see* 38 C.F.R. § 4.87. Concluding that, when read together, the regulations did not limit tinnitus in both ears to a single disability rating, the Veterans Court held that they plainly and unambiguously required separate ratings.

The VA appealed to the Federal Circuit, arguing for the first time that diagnostic code 6260 was ambiguous and that the court should defer to its interpretation. A8a. The Federal Circuit agreed with the Veterans Court that VA regulations listed tinnitus as a disease of the "ear." However, the Federal Circuit found that diagnostic code 6260 did not "address whether tinnitus, as perceived in one ear, two ears, or otherwise, is a single disability." *Smith v. Nicholson*, 451 F.3d 1344, 1350 (Fed. Cir. 2006); A1a-2a. Hence, the Federal Circuit agreed with the VA and held that diagnostic code 6260 was ambiguous. The Federal Circuit declared that there was "a lack of evidence in the record" contradicting the agency interpretation. A13a. Relying on selective precedent of this Court, the Federal Circuit held that the Veterans Court erred when it failed to defer to the VA's reasonable interpretation of its own ambiguous regulation.

REASONS FOR GRANTING THE WRIT

The Federal Circuit has overstepped the bounds of its Article III authority by failing to defer to the Veterans Court interpretation of VA regulations. Congress established the Veterans Court as the final Executive Branch authority on the interpretation of VA regulations. Because of its exclusive jurisdiction to review Board decisions, the Veterans Court is an expert tribunal specially qualified to perform that function. The Federal Circuit should have deferred to the Veterans Court unless the Federal Circuit found the Veterans Court interpretation plainly erroneous or inconsistent with the regulations.

Even if the Federal Circuit correctly found that diagnostic code 6260 was ambiguous, deference to the VA

interpretation was improper. This Court has consistently held that ambiguities in statutes granting benefits to veterans must be resolved in favor of veterans. The Court also has indicated that the same canon applies to ambiguous regulations. The Federal Circuit failed to consider whether that mandatory canon applied to the VA interpretation of diagnostic code 6260.

The Federal Circuit's errors harm a large number of disabled veterans and have the potential to harm many more. More than 6,000 veterans will be denied tens of millions of dollars in disability compensation to which they are entitled[2] if the Federal Circuit's decision in this case stands. *See* A74a-75a. During fiscal year 2005, the VA received 788,298 claims for benefits, according to the VA Under Secretary for Benefits. A71-73a. The Under Secretary estimated that by 2007 the annual number of claims will increase to 828,186. A71a-73a. All of these claims have the potential to be wrongly decided should Federal Circuit precedent requiring deference to narrow constructions of VA regulations stand. The large number of veterans adversely affected and potentially affected in the future by the Federal Circuit's decision and the many millions of dollars in VA disability compensation at issue warrant the granting of certiorari to resolve these important questions. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (indicating certiorari "granted because of the large number of . . . claimants. . . .").

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[2] *See* 38 U.S.C. § 1114(a), (b). This estimate is calculated based on the difference between the compensation paid to veterans rated ten and twenty percent disabled, *i.e.*, $106.00, paid retroactively over an average period of seventy-two months to six thousand veteran claimants.

I. THE FEDERAL CIRCUIT SHOULD DEFER TO THE VETERANS COURT, A TRIBUNAL WITH SPECIAL EXPERTISE IN REVIEWING VA REGULATIONS

The Federal Circuit misinterpreted or ignored some of this Court's precedent in reaching its decision in this case. The Federal Circuit relied on this court's jurisprudence establishing that an agency's interpretation of its own ambiguous regulation is entitled to substantial deference, but the court failed to recognize a controlling difference between those cases and this one. *See Smith*, 451 F.3d at 1349 (citing cases). Generally, an agency's interpretation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). In this case, however, unlike *Auer*, the Article III appellate court was not directly reviewing the agency decision, but rather was reviewing the decision of an expert court chartered by Congress specially to interpret VA regulations. In *Auer*, the agency interpretation had not undergone Article I court review.

This Court has never ruled on the extent to which the interpretation of an ambiguous agency regulation by an Executive Branch Article I court should be accorded deference. The Article I Veterans Court is the final Executive Branch authority to interpret a VA regulation in the context of a Board decision. 38 U.S.C. §§ 7252, 7261(a). Its interpretations should therefore be accorded the deference otherwise given to an agency interpretation where the agency is not subject to Article I court review.

A. The Veterans Court is an Expert Tribunal Within the Executive Branch

In recognition of their service, Congress has provided veterans with certain rights, including compensation for disabilities. *See, e.g.*, 38 U.S.C. § 1110; *United States v. Oregon*, 366 U.S. 643, 647 (1961) ("The solicitude of Congress for veterans is of long standing."). Here, Congress also has sought to protect the rights of veterans by establishing a tribunal specifically for that purpose. This Court has acknowledged that when Congress grants the right to disability compensation:

> it clearly has the discretion, in defining that right to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.

Crowell v. Benson, 285 U.S. 22, 83-84 (1932); *see also Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 571, 582 (1985) ("Congress is not barred from acting pursuant to its powers under Article I to vest decision-making authority in tribunals that lack the attributes of Article III courts."). This Court acknowledged that "where Congress creates a substantive right . . . Congress may have something to say about the proper manner of adjudicating that right." *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion). Congress made the Veterans Court the final Executive Branch authority on the meaning of VA regulations.

1. The Veterans Court is an Expert Tribunal

Congress explicitly provided that the Veterans Court was to have "*exclusive* jurisdiction to review decisions of the Board of Veterans' Appeals." 38 U.S.C. § 7252 (emphasis added). One express duty of the Veterans Court is to interpret VA regulations in the context of Board decisions. *Id.*; 38 U.S.C. § 7261(a)(1). Its exclusive jurisdiction has led the Veterans Court to become an expert authority on review of Board decisions and particularly VA regulatory interpretations therein. That expertise has been affirmed since shortly following the inception of the Veterans Court in 1988.[3] *See, e.g.*, *Salgado v. Brown*, 4 Vet. App. 316, 318-20 (1993) (construing 38 C.F.R. § 3.951 (1992) and invalidating VA General Counsel precedent opinion); *Gardner v. Derwinski*, 1 Vet. App. 584, 588 (1991) (invalidating 38 C.F.R. § 3.358(c)(3) (1990)), *aff'd, sub nom. Gardner v. Brown*, 5 F.3d 1456 (Fed. Cir. 1993), *aff'd, Brown v. Gardner*, 513 U.S. 115 (1994).

2. The Veterans Court is Part of the Executive Branch of Government

Congress placed the Veterans Court within the Executive Branch of government. Article I courts are "agencies of the legislative or executive branch." *Gliddon Co. v. Zdanok*, 370 U.S. 530, 599-600 (1962). The legislative history of the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), indicates that at least one house of Congress intended the Veterans Court to be an Article I

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[3] Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

tribunal within the Executive Branch. H.R. Rep. No. 100-963, at 5, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5786 ("An independent Court of Veterans Appeals would be established in the executive branch in lieu of the existing Board of Veterans' Appeals.").

Congress granted the President executive power over the Veterans Court, although the Veterans Court enjoys decisional independence. Unlike Article III courts, Congress provided that judges of the Veterans Court may be removed for cause by the President. 38 U.S.C. § 7253(f). A statute providing that the President could remove an officer of the Legislative or Judicial Branches would violate the doctrine of separation of powers. *See Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838). Any remaining doubt that the Veterans Court is an agency within the Executive Branch of government is dispelled by the fact that it must submit its budget request to the President for inclusion in his budget. 38 U.S.C. § 7282(a).

B. The Federal Circuit Should Defer to Veterans Court Interpretations of VA Regulations

This Court has long held that an agency's administrative interpretation of its own ambiguous regulation is generally entitled to great weight. *Auer*, 519 U.S. at 461. Indeed, such interpretations are upheld unless "plainly erroneous or inconsistent with the regulation." *See id.* Veterans Court interpretations of VA regulations should receive deference under the same standard. Congress is presumed to have been aware that this Court required deference to agency interpretations of their own ambiguous regulations from Article III courts when it enacted the Veterans' Judicial Review Act. *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Congress

should therefore be presumed to have intended that in veterans' matters, the Article III court was to defer to decisions of the Veterans Court rather than the VA. *Id.* Any other result renders the Veterans Court largely superfluous. Therefore, the Court should hold that, where Congress has created an Article I court within the Executive Branch for the express purpose, *inter alia*, of reviewing agency interpretations of its own regulations, the reviewing Article III court must defer to the interpretation of the Article I court rather than that of the agency.

Current precedent, while not addressing this issue directly, is not in conflict. For example, in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945), the Court addressed the meaning of Maximum Price Regulation No. 188, which had been promulgated by the Office of Price Administration. At issue in that case was the determination of the highest price Seminole Rock & Sand Co. had charged for crushed stone during March 1942. The Article III district court declined to defer to the agency's interpretation of its regulation and dismissed the action. The Court of Appeals for the Fifth Circuit affirmed. *See id.* at 412-13. This Court granted certiorari and reversed. *Id.* at 419. The Court held that the Office of Price Administration, the highest Executive Branch authority, was entitled to deference to its interpretation of the regulation in that case because its interpretation was not "plainly erroneous or inconsistent with the regulation." *Id.* at 414.

The Court followed the *Bowles* standard in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). In *Robertson*, the Forest Service issued a permit for development of federal land. Respondents in that case brought a challenge in the Article III district court asserting that the permit violated various statutes and a Forest Service regulation. *Id.* at 345-46, 358. A United States Magistrate upheld the permit, but the Ninth Circuit reversed. *Id.* at

346-47. On appeal, this Court found that there was "no basis for concluding that the Forest Service's own regulations must also be read in all cases to condition issuance of a special use permit on consideration (and implementation) of off-site mitigation measures." *Id.* at 358. As in *Bowles*, this Court upheld the interpretation by the Forest Service, the highest Executive Branch authority that had reviewed the regulation. The Court explained that it would defer to the "agency" interpretation because it was not unreasonable. *Id.* at 358-59.

Based on its decisions in *Bowles* and *Robertson*, the Court again upheld an agency's interpretation of its regulation in *Auer v. Robbins*, 519 U.S. 452. The Secretary of Labor filed an amicus brief in *Auer* at the request of the Court. *Id.* at 461. In that brief, the Secretary interpreted the "salary based test" contained in one of his regulations. *Id.* No other Executive Branch agency had interpreted the meaning of the phrase. The Court deferred to the Secretary's interpretation, citing *Robertson* and *Bowles*. *Id.*

In all three cases, the Article III court deferred to the highest Executive Branch authority. However, in none of those cases was the agency interpretation reviewed by a specialized Article I court within the Executive Branch. The Department of Labor, Forest Service, and Office of Price Administration each was the final Executive Branch authority to have interpreted the ambiguous regulations in question. In Petitioner's case, the Veterans Court, and not the VA, is the final Executive Branch authority to interpret the regulations at issue. Congress made the Veterans Court superior to the VA within the Executive Branch. *See* 38 U.S.C. § 7252. It is the interpretation of the Veterans Court, and not that of the VA, that is entitled to deference from the Federal Circuit. The Federal Circuit

incorrectly applied *Auer's* "plainly erroneous or inconsistent with the regulation" standard. This standard would have been properly applied to review of the Veterans Court's decision. The decision of the Veterans Court should have been affirmed.

II. RESOLVING AMBIGUITIES IN FAVOR OF VETERANS IS CONSISTENT WITH THE NON-ADVERSARIAL, *EX PARTE* SYSTEM FOR ADJUDICATING VETERANS' BENEFITS

The VA's procedures are to be non-adversarial in nature. In enacting the Veterans' Judicial Review Act, Congress emphasized its intention to retain the historically non-adversarial system under which veterans benefits are to be administered. At the same time, Congress highlighted the position of respect veterans occupy in the eyes of the law:

> *Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits.* This is particularly true of service-connected disability compensation where the element of cause and effect has been totally bypassed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the VA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, *[the VA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.*

H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95 (emphasis added). Congress expressly requires the VA to resolve "all issues," including ambiguities in its regulations, in favor of veterans. *Id.* Thus, the VA is distinct from most other agencies because of its pro-claimant, non-adversarial nature. That distinction further supports application of the Fishgold Rule requiring that interpretative doubt be resolved in favor of veterans. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (establishing canon that "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need") (hereinafter "Fishgold Rule"); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (stating veterans' statutes must be liberally construed for benefit of returning veteran) (citations omitted); *see, e.g., Elkins v. Gober*, 229 F.3d 1369, 1376 (Fed. Cir. 2000) (allowing piecemeal appeals because of "pro-claimant, nonadversarial, ex parte system that supplies veterans benefits"); *see also Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (concluding "in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systematic fairness and the appearance of fairness carries great weight"); *Collaro v. West*, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998) (describing "a nonadversarial, ex parte, paternalistic system for adjudicating veterans' claims").

A. Ambiguities in Statutes Providing Benefits to Veterans Must be Resolved in Favor of Veterans

The Federal Circuit compounded its error in not deferring to the Veterans Court by declining to follow this court's precedent when it failed to hold that an ambiguous

VA regulation must be construed in Petitioner's favor.[4] *See Smith*, 451 F.3d at 1349-52. This Court has held that ambiguities in statutes providing benefits to veterans must be resolved in favor of veterans. *E.g.*, *Fishgold*, 328 U.S. at 285; *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."). This Court has consistently followed the Fishgold Rule. *See King v. St. Vincent's Hospital*, 502 U.S. 215, 220-21, n.9 (1991); *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994).

B. The Court Should Extend the Fishgold Rule to the Interpretation of Ambiguous VA Regulations

The Court has indicated that the Fishgold Rule governs the resolution of ambiguities in all legal texts, not merely statutes. *King*, 502 U.S. at 220-21, n.9 (discussing "canon that *provisions* for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." (emphasis added)). The Court should expressly extend the Fishgold Rule to the interpretation of ambiguous VA regulations, particularly the Rating Schedule. This is so in light of the non-adversarial nature of the VA disability claims adjudication process and the unreviewable discretion Congress has granted to the VA to determine the content of that schedule. 38 U.S.C. §§ 1155, 7261.

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[4] Indeed, on appeal, the Veterans Court properly acknowledged "to the extent that there is any reasonable interpretive doubt regarding the meaning of § 4.25(b) and its application to DC 6260 . . . such doubt is to be resolved in favor of the veteran." *Smith*, 19 Vet. App. at 78, *rev'd*, 451 F.3d 1344; A46a.

In fact, the Veterans Court in this case, acknowledged that "to the extent that there is any reasonable interpretive doubt regarding the meaning of § 4.25(b) and its application to DC 6260 . . . such doubt is to be resolved in favor of the veteran." *Smith*, 19 Vet. App. at 78, *rev'd*, 451 F.3d 1344.

The narrow construction of ambiguous VA regulations harms veterans. Ambiguous VA regulations set a trap. Veterans file claims with the expectation that the VA will help them obtain benefits only to learn, as in this case, years later that the VA will not interpret the regulation as the veteran reasonably understood. The Secretary of Veterans Affairs should be required to exercise his discretion over the Rating Schedule with reasonable precision. If he fails to do so and a court interprets a regulation in a manner favorable to veterans, the Secretary has plenary discretion to revise the regulation if he objects to its liberal construction. It is the Secretary, not veterans, who should be held accountable for the ambiguities he creates.

In *King*, 502 U.S. at 220-21, n.9, this Court suggested that all "*provisions*," implicitly including regulations, granting benefits to veterans must be construed in favor of veterans. The suggestion in *King* is entirely consistent with the expressed intent of Congress. H.R. Rep. No. 100-963, at 13, *reprinted in* 1988 U.S.C.C.A.N. 5794-95. The Federal Circuit, also, has recognized that "[t]he canons of construction of course apply equally to *any* legal text and not merely statutes." *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (emphasis added) (superseded on other grounds) (applying canons to interpretation of regulations). However, the Federal Circuit has failed to apply the Court's Fishgold Rule to the interpretation of ambiguous VA regulations.

C. The Federal Circuit Improperly Deferred to the VA's *Post Hoc* Rationalization

In this case, the VA adopted inconsistent interpretations of diagnostic code 6260. Before the Veterans Court, the VA argued that diagnostic code 6260 unambiguously limited the disability rating for tinnitus to ten percent regardless of whether it was present in one ear or both. At the Federal Circuit, however, the VA changed its view and argued that diagnostic code 6260 was ambiguous. The VA asserted that the Federal Circuit was required to defer to this new interpretation. The Federal Circuit agreed without even considering the Fishgold Rule. *Smith*, 451 F.3d at 1350-52. The Federal Circuit reached a similar result in *Schism v. U.S.*, 316 F.3d 1259 (Fed. Cir. 2002) (*en banc*) (refusing to apply law of interpretative doubt to medical care regulation). Under the Federal Circuit's logic, there is no check that VA interpretations of ambiguous regulations are favorable to the veteran.

Here, the Federal Circuit mistakenly deferred to the litigation-induced interpretation of the VA. That VA interpretation was a *post hoc* rationalization of its decision to deny two disability ratings to Petitioner and not entitled to deference. In *Gonzalez v. Oregon*, 126 S.Ct. 904, 908 (2006), this Court suggested that deference to an agency's interpretation of a regulation would not be proper if that interpretation was based on *post hoc* rationalization. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

By deferring to the VA's new position, first expressed on appeal, the Federal Circuit erred because it did not rely

on the basis of denial articulated by the agency. *See id.* Application of the Fishgold Rule here would have avoided reliance on counsel's *post hoc* rationalization.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,

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September 18, 2006

ELLIS C. SMITH, Claimant-Appellee, v. R. JAMES NICHOLSON, Secretary of Veterans Affairs, Respondent-Appellant.

No. 05-7168

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

451 F.3d 1344; 2006 U.S. App. LEXIS 14919

June 19, 2006, Decided

COUNSEL: Ronald L. Smith, Disabled American Veterans, of Washington, DC, argued for claimant-appellee. Of counsel was Donald E. Purcell.

Claudia Burke, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellant. With her on the brief were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and Brian M. Simkin, Assistant Director. Of counsel on the brief were David J. Barrans, Deputy Assistant General Counsel, and Jamie L. Mueller, Attorney, United States Department of Veterans Affairs, of Washington, DC.

JUDGES: Before LOURIE, BRYSON, and GAJARSA, Circuit Judges.

OPINION BY: LOURIE

OPINION: LOURIE, Circuit Judge.

The Department of Veterans Affairs (the "DVA") appeals from the decision of the United States Court of Appeals for Veterans Claims (the "Veterans Court") reversing in part, vacating in part, and remanding the decision of the Board of Veterans' Appeals (the "Board"), holding, *inter alia*, that 38 C.F.R. § 4.25(b) and 38 C.F.R. § 4.87, DC

6260 require the assignment of dual ratings for bilateral tinnitus. *Smith v. DVA*, 19 Vet. App. 63 (2005). Because the Veterans Court erred in not deferring to the DVA's interpretation of its own regulations, we reverse and remand that portion of the court's decision. No other aspect of the court's decision is on appeal.

BACKGROUND

Smith served on active duty in the U.S. Army from March 1966 to March 1969. A report from an April 1995 VA audiological examination revealed that Smith had tinnitus. In October 1995, a VA regional office ("RO") found that Smith's tinnitus was service connected. However, the RO assigned a noncompensable disability rating to Smith's tinnitus because the evidence did not demonstrate that the tinnitus was "persistent" as required by 38 C.F.R. § 4.87, DC 6260. In April 1999, the RO issued a supplemental statement of the case reaffirming that Smith's tinnitus was not persistent. Prior to June 10, 1999, DC 6260 (hereinafter "pre-1999 DC 6260") provided for a 10% disability rating for a veteran with tinnitus if the evidence demonstrated that the tinnitus was "persistent as a symptom of head injury, concussion, or acoustic trauma." On June 10, 1999, DC 6260 (hereinafter "post-1999 DC 6260") was amended to provide a 10% disability rating for tinnitus if the evidence demonstrated that the tinnitus was "recurrent." 38 C.F.R. § 4.87, DC 6260 (2000).[1] The

[1] In May 2003, DC 6260 was further revised to include "Note (2): Assign only a single evaluation for recurrent tinnitus, whether the sound is perceived in one ear, both ears, or in the head." 38 C.F.R. § 4.87, DC 6260 (2004). This revision is not applicable to this case because of its effective date.

requirement that tinnitus must be a "symptom of head injury, concussion, or acoustic trauma" was deleted. Consequently, Smith appealed the RO's decision, asserting that his service-connected tinnitus should be evaluated under the post-1999 DC 6260, which requires that his tinnitus be "recurrent," rather than "persistent."

In a December 2000 decision, the Board considered Smith's claim under both the pre-1999 DC 6260 and the post-1999 DC 6260 regulations. With regard to pre-1999 DC 6260, the Board affirmed the RO's decision that Smith's tinnitus was not "persistent," which the Board defined as "insistently repetitive, or continuous, tenacious, or enduring." Thus, the Board determined that Smith was not entitled to a 10% disability rating prior to June 10, 1999. With regard to post-1999 DC 6260, the Board determined that Smith's tinnitus was "recurrent" and granted him a 10% disability rating, effective June 10, 1999. Smith appealed from the Board's decision, alleging that the evidence demonstrated that his tinnitus was "persistent" under pre-1999 DC 6260 and that the Board misinterpreted both pre-1999 and post-1999 DC 6260 by failing to award a separate 10% disability rating for service-connected tinnitus in each ear.

On June 10, 2003, the Veterans Court reversed in part, vacated in part and remanded the Board's decision. *Smith v. Principi*, 17 Vet. App. 168 (2003). First, the court reversed the Board's conclusion that Smith's tinnitus was not "persistent" as required by pre-1999 DC 6260, concluding that the Board's decision was "arbitrary, capricious, and an abuse of discretion," and remanded for assignment of a 10% disability rating and determination of an appropriate effective date. Second, the court vacated the portion of the Board's decision that denied two disability ratings

for Smith's service-connected tinnitus, one for each ear, and remanded for the Board to consider whether a single 10% rating is appropriate for bilateral tinnitus under 38 C.F.R. § 4.25(b), which provides that "disabilities arising from a single disease entity . . . are to be rated separately." *Id.*

The DVA moved without opposition to vacate the Veterans Court's decision and remand the case for further proceedings consistent with this court's recent decision in *Wanner v. Principi*, 370 F.3d 1124 (Fed. Cir. 2004). In *Wanner*, we had reversed a Veterans Court's decision, concluding that it lacked jurisdiction to review the content of a rating schedule. Because the Veterans Court in this case relied heavily on its decision in *Wanner*, we reversed the court's determination that it had jurisdiction in this case and remanded for further proceedings consistent with our decision in *Wanner*. *Smith v. Principi*, 108 Fed. Appx. 628 (Fed. Cir. 2004).

On remand, the Veterans Court first held that it had jurisdiction to review both the Board's interpretation of the term "persistent" in pre-1999 DC 6260 and whether § 4.25(b) permits dual ratings for tinnitus. The Veterans Court reasoned that its review of regulations DC 6260 and § 4.25(b) did not involve evaluating the content of a rating schedule, but rather an interpretation of language in the regulations, subject matter over which the Veterans Court has jurisdiction. The Veterans Court then vacated the Board's decision with regard to the term "persistent" under pre-1999 DC 6260 and remanded to the Board for an explanation of its interpretation of the term "persistent." With regard to the question whether pre-1999 and post-1999 DC 6260 permit dual ratings for tinnitus, the court reversed the Board's decision that DC 6260 did not

authorize the assignment of two 10% ratings for bilateral tinnitus and determined that regulations § 4.25(b) and DC 6260 required such dual ratings for bilateral tinnitus. The Veterans Court observed that the DVA's interpretation of its regulations, DC 6260 and § 4.25(b), conflicted with their plain meaning. The Veterans Court noted that DC 6260 lists tinnitus as a "disease of the ear" and that § 4.25(b) provides for a separate rating for each service-connected disability arising from a single disease, unless otherwise provided. Thus, the Veterans Court determined that a "plain reading" of those regulations taken together results in a "rating of 10% for each ear affected by a single case of tinnitus." *Smith v. DVA*, 19 Vet. App. at 75. The Veterans Court then remanded for the Board to consider whether Smith had bilateral tinnitus, and, if so, for assignment of a dual rating.

The DVA timely appealed the Veterans Court's decision regarding whether the regulations permit a dual rating for bilateral tinnitus, and, as we explain below, we have jurisdiction pursuant to 38 U.S.C. § 7292(a).

DISCUSSION

The scope of our review of a Veterans Court's decision is limited by statute. 38 U.S.C. § 7292. Under § 7292(a), we may review a decision by the Veterans Court with respect to the validity of "any statute or regulation . . . of any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [Veterans] Court in making the decision." This appeal involves the Veterans Court's interpretation of certain DVA regulations, and therefore we normally would have jurisdiction to consider that interpretation under § 7292(a). We review

interpretation of regulations by the Veterans Court *de novo* and may set aside any regulation or interpretation of a regulation that we find to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to a constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or without observation of a procedure required by law. 38 U.S.C. 7292(d)(1); *Wanner*, 370 F.3d at 1128.

As an initial matter, however, we must consider whether we have jurisdiction to hear this appeal at this time. We conclude that we do and agree with the DVA that, even though the Veterans Court remanded the case to the Board, we have jurisdiction over this appeal under the principles set forth in *Williams v. Principi*, 275 F.3d 1361 (Fed. Cir. 2002).[2] Generally, we do not have jurisdiction to review non-final judgments. *Adams v. Principi*, 256 F.3d 1318, 1320 (Fed. Cir. 2001). We have determined that a remand order from the Veterans Court is not considered a final judgment and hence is usually not appealable. *Id.* In *Williams*, however, we set forth an exception to the general rule that non-final decisions are not reviewable. As we explained in *Williams*:

> We will depart from the strict rule of finality when the Court of Appeals for Veterans Claims has remanded for further proceedings only if three conditions are satisfied: (1) there must have been a clear and final decision of a legal issue that (a) is separate from the remand proceedings, (b) will directly govern the remand proceedings or, (c) if

[2] Smith does not in fact dispute that we have jurisdiction under *Williams*.

> reversed by this court, would render the remand proceedings unnecessary; (2) the resolution of the legal issues must adversely affect the party seeking review; and, (3) there must be a substantial risk that the decision would not survive a remand, i.e., that the remand proceeding may moot the issue.

275 F.3d at 1364 (footnotes omitted).

With regard to the first condition, the Veterans Court interpreted regulations § 4.25(b) and DC 6260, concluding that they require a dual rating for bilateral tinnitus, and remanding to determine if Smith has bilateral tinnitus. Thus, a clear final decision was rendered on a legal issue – the interpretation of the regulations – and that interpretation will directly govern the remand proceedings. In addition, our reversal of that interpretation would render the remand order unnecessary because, if we determine that the DVA's interpretation is correct and that the regulations provide for a single 10% disability rating for tinnitus, then determining whether Smith's tinnitus is bilateral will be irrelevant, as he will not be entitled to a rating greater than 10%. With regard to the second condition, the interpretation of regulations § 4.25(b) and DC 6260 by the Veterans Court adversely affects the party seeking review, the DVA, because the court's interpretation requires the DVA to issue a disability rating for bilateral tinnitus contrary to its interpretation of the regulations. Finally, as for the third condition, the remand proceeding, if not appealed now, would moot the legal issue because, if the Board on remand applied the Veterans Court's interpretation of regulations § 4.25(b) and DC 6260 and granted Smith the benefit he seeks under that interpretation, the DVA would be precluded from

appealing that action. *See* 38 U.S.C. § 7252(a) (providing that the Veterans Court "shall have exclusive jurisdiction to review decision of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision."). Accordingly, we conclude that we have jurisdiction to review the decision of the Veterans Court under *Williams*.

Turning to the merits of the appeal, this case presents an issue with consequences well beyond this case – whether the Veterans Court correctly interpreted DVA regulations DC 6260 and § 4.25(b) to require dual (separate) 10% ratings for bilateral tinnitus. We understand that many appeals are pending, and have been stayed, that will likely be governed by our decision.

The DVA asserts that the Veterans Court's interpretation contradicts the DVA's interpretation of its own regulations, and that the Veterans Court erred by not deferring to the DVA's interpretation of its own regulations. The DVA contends that it has interpreted § 4.25(b) and DC 6260 to permit a single rating for tinnitus, irrespective of whether the disease affects both ears, and that it has been the standard practice of the DVA to award a veteran with bilateral tinnitus a single disability rating under DC 6260. According to the DVA, its interpretation of those regulations is a reasonable one as it is supported by medical evidence and is embodied in numerous public documents. The DVA asserts that the regulations do not clearly address whether a veteran is entitled to two separate ratings for bilateral tinnitus, and that its own interpretation of the regulations is not inconsistent with the regulation. Because the DVA's interpretation of its own regulations is not plainly inconsistent with the regulations, the DVA contends that its interpretation is entitled to substantial deference by the Veterans Court. Finally, the DVA observes

that the addition of Note 2 to DC 6260 was not a substantive change to the regulation; in fact, it reflects the DVA's past practice of awarding a single rating for bilateral tinnitus.

Smith responds that the Veterans Court correctly determined that the plain meaning of the regulations entitles him to two separate disability ratings for service-connected tinnitus affecting both ears. According to Smith, DC 6260 refers to tinnitus as a "disease of the ear." Accordingly, if the disease, *i.e.*, tinnitus, results in a disability in both ears, then the plain language of § 4.25(b) entitles the veteran to two separate 10% ratings. In addition, if the DVA intended to provide for one rating for a disease with two disabilities, it would do so expressly in a regulation. Smith also responds that the Veterans Court was correct in not deferring to the DVA's interpretation of its regulation because that interpretation is inconsistent with the regulation's plain meaning. Moreover, Smith observes that the DVA's interpretation of its own regulations is found only in unpublished opinions or litigating documents, which are not entitled to deference. According to Smith, the DVA did not publish its interpretation of DC 6260 until it added Note 2 to DC 6260 in 2003, and that interpretation cannot be applied retroactively.

We agree with the DVA that the Veterans Court erred by not deferring to the DVA's interpretation of its own regulations. At issue is the interpretation of language in regulations, not statutes. The relevant regulations are as follows:

> § 4.25 Combined ratings table.
>
> (b) Except as otherwise provided in this schedule, the disabilities arising from a single

> disease entity, e.g., arthritis, multiple sclerosis, cerebrovascular accident, etc., are to be rated separately as are all other disabling conditions, if any. All disabilities are then to be combined as described in paragraph (a) of this section.

38 C.F.R. § 4.25(b) (emphasis added).

§ 4.87 Schedule of ratings – ear.

DISEASES OF THE EAR	Rating
6260 Tinnitus:	
Persistent as a symptom of head injury, concussion or acoustic trauma	10

Effective from June 10, 1999, the DVA amended 6260 to provide:

6260 Tinnitus, recurrent	10

38 C.F.R. § 4.87, DC 6269 (2000).

The Supreme Court has held that an agency's interpretation of its own regulations is entitled to substantial deference by the courts. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 121 S. Ct. 1433, 149 L. Ed. 2d 401 (2001); *Auer v. Robbins*, 519 U.S. 452, 461-62, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965). As the Court has further recognized, when a court is interpreting an administrative

regulation, it "must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945). The administrative construction becomes "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* In addition, such deference is afforded to an agency's interpretation of its own regulations even when that interpretation is offered in informal rulings such as in a litigating document. *Auer*, 519 U.S. at 461; *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1363-64 (Fed. Cir. 2005); *Am. Express Co. v. United States*, 262 F.3d 1376, 1382-83 (Fed. Cir. 2001).

Applying those principles to this case, we conclude that the Veterans Court erred in not deferring to the DVA's interpretation of its own regulations, § 4.25(b) and DC 6260, which limits a veteran to a single disability rating for tinnitus, regardless whether the tinnitus is unilateral or bilateral. First, we consider whether the language of the regulations § 4.25(b) and DC 6260 leaves "in doubt" whether tinnitus in each ear constitutes separate disabilities. We conclude that it does. Section 4.25(b) provides that "[e]xcept as otherwise provided in this schedule, the disabilities arising from a single disease entity . . . are to be rated separately as are all other disabling conditions, if any." 38 C.F.R. § 4.25(b). Thus, § 4.25(b) is a general rule requiring separate disability ratings for each disability arising from a single disease. The question here is whether tinnitus in both ears constitutes separate disabilities. The Veterans Court observed that under DC 6260, tinnitus is listed as a disease of the ear, implicating § 4.25(b), which also uses the term "disease." But, while tinnitus is listed under the heading "diseases of the ear," DC 6260 does not

address whether tinnitus, as perceived in one ear, two ears, or otherwise, is a single disability. The plain language of regulations § 4.25(b) and DC 6260 clearly does not resolve that question.

The Veterans Court determined that the meaning of the regulations is clear, leaving no doubt that dual ratings for bilateral tinnitus are required under the regulations. We do not agree with the Veterans Court's analysis. According to the Veterans Court, "nothing in the rating schedule limits a veteran with tinnitus in both ears to only one rating"; the court thus concluded that the "plain reading and application of § 4.25(b) and DC 6260 results in a rating of 10% for each ear affected by a single case of tinnitus." *Smith v. DVA*, 19 Vet. App. at 75. As the DVA observed, however, the Veterans Court necessarily presumed that tinnitus in one ear constitutes one disability, and that tinnitus in two ears constitutes two disabilities. Without such an assumption, however, which the DVA has reasonably rejected as not supported by the text of the regulations, the plain language of the regulations still leaves the pertinent inquiry unresolved and does not compel the conclusion that tinnitus in two ears constitutes two disabilities. Because the regulations here leave in doubt whether tinnitus in each ear can be a separate disability, they are ambiguous, and the DVA was entitled to apply its own construction to the ambiguous regulations.

Having concluded that the regulations leave the pertinent inquiry unresolved, deference must be afforded to the DVA's interpretation as long as that interpretation is not "plainly erroneous or inconsistent with the regulations." Thus, we must also consider whether the DVA's interpretation of the regulations – that tinnitus in both

ears is one disability – is "plainly erroneous or inconsistent with the regulations"; we determine that it is not. The DVA argues that its interpretation that tinnitus constitutes both a disease and a disability is founded upon its analysis of medical principles. Although we do not evaluate those principles, there is a lack of evidence in the record that the DVA's interpretation is plainly erroneous. The DVA's interpretation is also not inconsistent with the regulations, as the regulations do not address whether tinnitus is one disability.

There is also "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question" and it is entitled to deference. *Auer*, 519 U.S. at 462. Smith argues that the DVA's interpretation is expressed in unpublished statements or in litigating positions, neither of which gives notice to the public or is entitled to deference. We disagree. First, the DVA has consistently interpreted the regulations to allow a maximum 10% disability rating for tinnitus, and that interpretation is reflected in various public documents. *See e.g., Cromley v. Brown*, 7 Vet. App. 376, 378 (1995) ("As the Board noted, the appellant is already rated at 10%, the highest level possible under the regulations for tinnitus."); *Wanner*, 17 Vet. App. at 9 (quoting the Board's statement that its 10% disability rating to a veteran "remains the maximum disability rating available under [DC 6260]"); VAOPGCPREC 2-2003 ("Diagnostic Code 6260 (currently codified at 38 C.F.R. § 4.87), as in effect prior to June 10, 1999 . . . authorized a single 10% disability rating for tinnitus, regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head."); 67 Fed. Reg. 59,033 (Sept. 19, 2002) (stating, in connection with the proposed addition of Note 2, that the amendment

making explicit that tinnitus receives a single evaluation, "whether the sound is perceived in one ear, both ears, or in the head" involves "no substantive change and is consistent with current practice").[3]

Second, and more importantly, even if the DVA's interpretation were not reflected in published documents and was only reflected in litigating documents, that would still not be a basis for declining to defer to the agency's interpretation of its own regulation. In *Auer*, the Supreme Court afforded deference to an agency's interpretation of its regulations even when that interpretation was first expressed in an amicus brief to the Court. 519 U.S. at 461, 117 S. Ct. 905. Contrary to *Chevron* deference, which applies to an agency's interpretation of a statute and generally requires relatively formal administrative procedures such as notice and comment rulemaking or formal adjudication, an agency's interpretation of its regulations does not require observance of those formalities in order to be afforded deference. Thus, the Veterans Court erred in not deferring to the DVA's interpretation of its own regulations.

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[3] Board decisions that reflect the DVA's interpretation of DC 6260 and § 4.25(b) as authorizing a maximum 10% rating for tinnitus are publicly available through the Board's internet decision database. *See e.g.*, Citation No. 9630919, Docket No. 95-09 946 (Oct. 30, 1996); Docket No. 93-22 991 (Sept. 15, 1999); Citation No. 9932638, Docket No. 95-27 246 (Nov. 18, 1999).

CONCLUSION

Because the Veterans Court erred in not deferring to the agency's reasonable interpretation of its own regulations, we reverse the decision of the Veterans Court and remand for proceedings consistent with our decision.

REVERSED AND REMANDED.

Smith v. Nicholson

NO. 01-623

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19 Vet. App. 63; 2005 U.S. App. Vet. Claims LEXIS 143

February 17, 2005, Argued
April 5, 2005, Decided

COUNSEL: Ronald L. Smith, with whom Landon E. Overby and J. Marc Burgess (nonattorney practitioners), all of Washington, D.C., were on the brief, for the appellant.

John D. McNamee, with whom Tim S. McClain, General Counsel; R. Randall Campbell, Assistant General Counsel; and Brian B. Rippel, Deputy Assistant General Counsel, all of Washington, D.C., were on the brief, for the appellee.

JUDGES: Before IVERS, Chief Judge, and STEINBERG and KASOLD, Judges. STEINBERG, Judge, filed the opinion of the Court. IVERS, Chief Judge, filed an opinion concurring in part and dissenting in part.

OPINION BY: STEINBERG

OPINION:

STEINBERG, Judge: Veteran Ellis Smith (the appellant), through counsel, seeks review of a December 12, 2000, decision of the Board of Veterans' Appeals (BVA or Board) that, inter alia, granted a Department of Veterans Affairs (VA) disability rating of 10% (but no higher) effective from June 10, 1999, for his service-connected tinnitus pursuant to 38 C.F.R. § 4.87, Diagnostic Code (DC) 6260,

but denied a compensable rating prior to that date. Record (R.) at 3; *see* 38 C.F.R. § 4.87, DC 6260 (1999 & 2000). ("Tinnitus" is "a noise in the ears, such as ringing, buzzing, roaring or clicking." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (DORLAND'S) 1714 (28th ed. 1994).) The parties each filed briefs, and the appellant filed a reply brief. (As discussed below, this appeal has already been the subject of a June 23, 2003, decision by this Court, *Smith v. Principi*, 17 Vet. App. 168 (2003) (per curiam order) (*Smith I*), which was reversed, and the matter was remanded, by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), *Smith v. Principi*, No. 03-7212, 108 Fed. Appx. 628, 2004 WL 2030123 (Fed. Cir. 2004) (*Smith II*).) Thereafter, the Court ordered additional briefing from the parties, both parties filed responses, and the Court then heard oral argument in the case. At oral argument, the Court ordered further supplemental briefing on the issue of reversal regarding an earlier effective date, which had not been addressed by the parties. For the reasons set forth below, the Court will vacate the December 2000 BVA decision in part, reverse it in part, and remand the matters for proceedings consistent with this opinion.

I. Relevant Background

The veteran had active service in the U.S. Army from March 1966 to March 1969, including service in the Republic of Viet Nam (R. at 21) where he reportedly was exposed to artillery fire. R. at 141. In 1994, he filed a claim with a VA regional office (RO) for service connection for, inter alia, bilateral hearing loss. R. at 69. Several VA audiological examinations were conducted in order to assess his claim. R. at 88, 101, 142, 244-45. A report from an April 1995 VA audiological examination, although

inconclusive as to hearing loss, revealed that the veteran also had tinnitus; he described his tinnitus as "high pitched, periodic, and of mild to moderate severity", and as a condition that he had experienced "for the past 15 years". R. at 88. In May 1995, the RO, inter alia, granted service connection for hearing loss in the right ear (rated as noncompensable), and denied the tinnitus claim as not well grounded. R. at 92. The veteran submitted a Notice of Disagreement (NOD) as to that decision, and in October 1995 the RO, inter alia, awarded service connection for the veteran's tinnitus, rated as noncompensable, effective from April 1995 (R. at 172); the RO found that "the evidence showed a diagnosis of tinnitus due to acoustic trauma", and that "reasonable doubt had been resolved in favor of the claimant regarding acoustic trauma leading to his tinnitus because of his assignment as a vehicle mechanic in service and his subjective history of assignment in combat to an artillery unit." R. at 170. However, the RO assigned a noncompensable disability rating on the ground that "the evidence [did] not show tinnitus which [was] persistent". R. at 170. The veteran filed an NOD as to, inter alia, the noncompensable rating for tinnitus. R. at 174.

At a 1997 hearing before the Board, the veteran provided sworn testimony that he had experienced the "ringing" in both his left and right ears for the past 15 years. R. at 244. In a November 1997 decision, the Board, inter alia, remanded the veteran's tinnitus claim to the RO for further development and to "assess the present severity of hearing loss in his left ear and bilateral tinnitus, since he indicated . . . that he had been experiencing frequent draining and ringing in his ears." R. 275. In April 1999, the RO issued a Supplemental Statement of the

Case (SSOC) that, inter alia, continued a noncompensable rating for the veteran's service-connected tinnitus, because under DC 6260 "[a] noncompensable evaluation is assigned unless the record shows ***persistent*** tinnitus as a symptom of head injury, concussion, or acoustic trauma", and that the veteran had reported "***occasional***" tinnitus, not ***persistent*** tinnitus. R. at 289-92 (emphasis added).

On June 10, 1999, DC 6260 was revised to provide for a 10% rating for "tinnitus, ***recurrent***", and the requirement that, in order to be compensable, the tinnitus must have resulted from "head injury, concussion[,] or acoustic trauma" was deleted. 64 Fed. Reg. 25,202, 25,206 (May 11, 1999); 38 C.F.R. § 4.87, DC 6260 (1999 & 2004) (emphasis added). The veteran subsequently filed a Substantive Appeal as to the decision contained in the April 1999 SSOC; he asserted, inter alia, that his "service[-]connected tinnitus [was] still being evaluated under the old criteria, which required ***persistent*** symptoms rather than intermittent [sic] symptoms as the law now requires for a 10% evaluation." R. at 398 (emphasis added).

In the December 12, 2000, BVA decision here on appeal, the Board determined that the amended DC was more favorable than the pre-June 10, 1999, DC (hereinafter pre-1999 DC 6260) and applied that amended version to the veteran's claim, as of June 10, 1999 (R. at 6-7, 9); the Board concluded that prior to that date, the veteran had not satisfied the criteria for a 10% rating under pre-1999 DC 6260 because his tinnitus was not "persistent", which the Board defined as "insistently repetitive, ***or*** continuous, tenacious, ***or*** enduring". R. at 8 (emphasis added). He sought review of that decision in this Court (R. at 397), where his appeal was reviewed by a three-judge panel in 2003. *Smith I, supra.* At that time, he asserted, as

he does today, (1) that his tinnitus "undeniably satisfied the plain meaning of 'persistent'" in pre-1999 DC 6260 and that the Board's conclusion to the contrary was "legal error", and (2) that the Board had misinterpreted both pre-1999 and then-current DC 6260 when it had failed to award separate 10% disability ratings for each ear for his service-connected tinnitus. *Smith I*, 17 Vet. App. at 169.

In *Smith I*, this Court, on June 10, 2003, ordered the December 12, 2000, BVA decision reversed in part and vacated in part. *Smith I*, 17 Vet. App. at 173. As to the meaning of "persistent" in pre-1999 DC 6260, the Court held that "because 'persistent' and 'recurrent' appear to have overlapping definitions . . . the Board's conclusion that the appellant's tinnitus was not 'persistent' as required by pre-1999 DC 6260 was reached in a manner that was 'arbitrary, capricious, and an abuse of discretion'" and therefore must be reversed. *Smith I*, 17 Vet. App. at 171. As to the issue of separate tinnitus ratings for each ear, the Court held that this Court's precedential opinion in *Wanner v. Principi*, 17 Vet. App. 4 (2003) (*Wanner I*), *rev'd in part*, 370 F.3d 1124 (Fed. Cir. 2004) (*Wanner II*), "applies to the instant case and requires a remand for readjudication, in light of 38 C.F.R. § 4.25(b) (2002) [(requiring that "disabilities arising from a single disease entity . . . are to be rated separately")], of the appellant's claim for two 10% ratings." *Smith I*, 17 Vet. App. at 171. After the issuance of *Smith I*, the Secretary sought review of that decision in the Federal Circuit as to our action on the question of the interpretation of "persistent". On August 23, 2004, the Federal Circuit reversed, stating:

> The decision on appeal relied heavily on the Court of Appeals for Veterans Claims [(CAVC)] decision in *Wanner* [*I, supra*,] in concluding that

> it had jurisdiction to review the [DC], which is included in the rating schedule. Thus, we reverse the [CAVC] determination in this case that it had jurisdiction and remand for further proceedings consistent with our decision in *Wanner* [*II, supra*].

Smith II, supra. In the *Wanner II* opinion, to which the above-quoted passage refers, the Federal Circuit reversed this Court's holding in *Wanner I.*

In *Wanner I*, this Court had concluded that it had jurisdiction to review DC 6260 for consistency with 38 U.S.C. § 1110 and that such an inquiry did not constitute a review of the rating schedule (which is prohibited by 38 U.S.C. § 7252(b)). After reaching that conclusion, this Court had then invalidated the trauma requirement contained in pre-1999 DC 6260 because it was "in violation of [the] statutory right" provided in section 1110, and therefore "not in accordance with law" pursuant to 38 U.S.C. § 7261(a)(3)(C) and (A), and because it was the product of "arbitrary and capricious" rulemaking pursuant to section 7261(a)(3)(A). *Wanner I*, 17 Vet. App. at 17-18. The second issue that this Court addressed in *Wanner I* was whether the rating schedule allowed for the assignment of two 10% ratings for bilateral tinnitus. *Wanner*, 17 Vet. App. at 13. As to that issue, the Court held, inter alia, that by failing to address 38 C.F.R. § 4.25(b) (2002) the Board had failed to provide an adequate statement of reasons or bases for its determination that DC 6260 provides for only one 10% rating for bilateral tinnitus (rather than two, one for each ear). *Ibid.*

In its reversal of *Wanner I*, the Federal Circuit held in *Wanner II* that this Court's review of DC 6260 for consistency with section 1110 "amounted to a direct review of the

content of the rating schedule", and that, in conducting such a review, this Court had acted "outside of its jurisdiction as provided by 38 U.S.C. § 7252(b)". *Wanner II*, 370 F.3d at 1131. Although the Federal Circuit there reversed this Court's decision to strike the trauma requirement from pre-1999 DC 6260, there is no indication that that court intended to disturb our *Wanner I* reasons-or-bases remand for consideration of § 4.25(b). *Ibid.*

Likewise, in its review of *Smith I*, the Federal Circuit in *Smith II* indicated no intent to disturb our *Smith I* reasons-or-bases remand for readjudication in light of § 4.25(b). *See Smith II, supra.* The Federal Circuit issued its mandate in *Smith II* on October 14, 2004, and the matter is now back before this Court. *Ibid.* In preparation for the current re-review of this matter, this Court on November 2, 2004, ordered supplemental briefing from the parties to address the following two issues: (1) To show cause why the Court should not remand to the Board the matter of the rating under pre-1999 DC 6260 for the provision of an adequate statement of reasons or bases, *see* 38 U.S.C. § 7104(d)(1), as to the Board's determination of the meaning of "persistent" under that DC; and (2) to address the appellant's argument that 38 C.F.R. § 4.25(b) (1999) entitled him to separate ratings of 10% for tinnitus in each ear under DC 6260 (1998 & 1999).

II. Contentions on Appeal

A. Pre-1999 Rating

In its November 2, 2004, order, the Court directed the Secretary, inter alia, to

> show cause why the Court should not remand to the Board the matter of the rating under pre-1999 DC 6260 for the provision of an adequate statement of reasons or bases, *see* 38 U.S.C. § 7104(d)(1), as to the Board's determination of the meaning of "persistent" under that DC in light of the Board's having selectively paraphrased the Secretary's Supplementary Information and not having taken into account all of the Secretary's relevant discussion therein, *see* 59 Fed. Reg. 17,295, 17,297 ([Apr.] 12, 1994), and having relied on a single dictionary definition of "persistent", *see Theiss v. Principi*, 18 Vet. App. 204, 210-11 (2004) (criticizing General Counsel precedent opinion, on which Board had relied, for "selective use of a narrow set of definitions") . . . ; *see Smith I*, 17 Vet. App. at 170-71. . . .

Smith (Ellis) v. Principi, 18 Vet. App. 448, 450 (2004) (per curiam order). In his December 2004 supplemental brief filed in response to the Court's November 2, 2004, order, the Secretary asserts that "the Court should remand the matter of the rating under pre-1999 DC 6260" so that the Board may provide an adequate statement of reasons or bases as to its "determination of the meaning of 'persistent' under that DC". Secretary's (Sec'y) Supplemental (Suppl.) Brief (Br). at 3. In his January 2005 supplemental brief, the appellant "concurs with the Secretary on this issue" and urges the Court to remand that issue. Appellant's (App.) Suppl. Br. at 2. However, at oral argument the appellant's counsel "clarified" to the Court that the appellant had not abandoned his argument for reversal on this ground. The Court then ordered from the bench that further supplemental briefs be submitted on the reversal question. That briefing was completed on March 24, 2005.

In his March 9, 2005, supplemental memorandum of law, the Secretary presents several arguments. First, he asserts that "given that the words 'persistent' and 'recurrent' and, by implication, the meaning of those terms, are inarguably a part of the ratings schedule, this Court lacks authority to review the matter." Sec'y Suppl. Memorandum (Mem.) at 6. In the alternative, he argues that, even if the Court possessed the authority to review VA's interpretation of those terms, the Court must defer to VA's interpretation because "an agency's interpretation of its own regulations must be given effect 'so long as the interpretation sensibly conforms to the purpose and wording of the regulations.'" *Id.* at 8. (citing *S. Cal. Edison Co. v. United States*, 226 F.3d 1349, 1356-57 (Fed. Cir. 2000) (quoting *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991))). As support for VA's interpretation of "persistent" in pre-1999 DC 6260, the Secretary asserts:

> From 1945 until 1999 the Secretary's rating code for tinnitus provided that in order to be compensable, tinnitus had to be constant. The precise term used from 1945 was 'continuous' and from 1976 to 1999 it was 'persistent'. . . .
>
> This requirement of persistence continued until the Secretary decided to liberalize the rating schedule as to tinnitus, replacing the requirement with a new, distinct term, "recurrent." As the Secretary noted in the 1994 commentary to the proposed rulemaking [(59 Fed Reg. at 17,297)], the deliberate change to the word "recurrent" encompassed a new meaning, "that tinnitus might not always be present, but that it does return at regular intervals." The Secretary's decision to revise the rating schedule was the culmination of a General Accounting Office study,

> which recommended that the rating schedule be reviewed and updated, recommendations by VA medical doctors and VA rating specialists, and recommendations by an outside consultant and panel of non-VA specialists on hearing and ear conditions, in order to update the schedule in accordance with the medical community's understanding of the impact of hearing disorders and other diseases. 59 Fed. Reg. at 17,295-96.

Suppl. Mem. at 4-5. Hence, the Secretary asserts that VA's interpretation "is an accepted and valid one," and that "although there might be other definitions" for "persistent" and "recurrent", "this Court is not free to substitute a different definition". *Id.* at 8-9. In response, the appellant contends that under *Sellers v. Principi*, 372 F.3d 1318 (Fed. Cir. 2004), "this Court has jurisdiction to review a VA interpretation of a regulation." App. Suppl. Mem. at 3-4. He asserts further that the authorities cited by the Secretary do not support his assertion that the Board's interpretation of a regulation is entitled to deference from this Court (*id.* at 4); rather, he contends that, although an agency's interpretation of a statute is entitled to deference, at the time of the Board decision here on appeal, as "the Secretary conceded at oral argument[,] . . . there had been no interpretation of [DC] 6260 by VA or its General Counsel", and, therefore, there was then "nothing to which the Court could properly defer", *ibid.* The appellant seeks reversal on this issue.

B. Separate Tinnitus Ratings

The appellant asserts that he is entitled to dual 10% ratings for tinnitus for essentially two reasons. First, he asserts that, pursuant to 38 C.F.R. § 4.25(b), "the general

rule adopted by [ ] VA with respect to rating all disabilities is that each service-connected disability shall be separately rated and the ratings combined." App. Br. at 10. Hence, the appellant asserts that he "is entitled to have the tinnitus in his ears separately rated in accordance with § 4.25(b), unless the rating schedule provides an exception to the general rule." App. Br. at 10. The appellant states further:

> When the Secretary intends to provide a single rating where a disability is either unilateral or bilateral, he provides for that single rating in unambiguous terms. . . . These provisions make clear that where the Secretary intends to make an exception to § 4.25 by limiting compensation to a single rating for a disability that is either unilateral or bilateral he knows how to do so. The Secretary having not provided a single rating for unilateral or bilateral tinnitus, separate ratings are required. *See* 38 C.F.R. § 4.25.

App. Br. at 12-13. Second, the appellant contends that "when called upon to construe an ambiguous statute providing benefits to veterans, the Court will apply the principle that 'interpretive doubt is to be resolved in the veteran's favor'" *Id.* at 11-12 (quoting *Brown v. Gardner* [hereinafter *Brown v. Gardner*], 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994)). Hence, the appellant asserts, the "mandatory canon of construction enunciated in *Brown v. Gardner* and adopted by this Court in *McCormick* [*v. Gober*, 14 Vet. App. 39 (2000)] and *Ryan* [*v. West*], 13 Vet. App. 151 (1999) is directly applicable to this appeal." Br. at 12.

The Secretary contends that the appellant is not entitled to a tinnitus rating greater than 10% because the

rating schedule does not allow for dual ratings of 10% for bilateral tinnitus. Specifically, the Secretary asserts:

> The rating schedule is not ambiguous. It explicitly prohibits pyramiding of disability evaluations. Where separate ratings are permitted for like organs, the rating code explicitly provides for such. *See, e.g.*, 38 C.F.R. § 4.87, DC 6207 (Loss of auricle); [ ] § 4.115(b) (Testis, atrophy complete), and DC 7524 (Testis, removal); [ ] § 4.16, DC 7626 (Breast, surgery of). If the Secretary had intended to provide separate ratings for tinnitus in the schedule of ratings related to ears, he would have employed specific language to do so, as he did for rating disability of the auricles (DC 6207).

Sec'y Br. at 7. As support for his assertion, the Secretary points to the fact that VA amended the rating schedule, effective June 13, 2003, by adding to DC 6260 "Note 2", which provides: "Assign only a single evaluation for recurrent tinnitus, whether the sound is perceived in one ear, both ears, or in the head", 38 C.F.R. § 4.87, DC 6260 (2004). Suppl. Br. at 4. The Secretary asserts that "Note 2 did not change the way VA evaluates tinnitus . . . [; r]ather, the note was added to reflect VA's standard practice", and that "Note 2" would hence apply to claims filed prior to the June 2003 effective date of that amendment, such as in this case. *Ibid.* This position, according to the Secretary, is consistent with VA General Counsel Precedent Opinion 2-2003 (May 13, 2003) [hereinafter G.C. Prec. 2-2003] and VA's Supplementary Information contained in the preambulatory language of the proposed and final rule amending DC 6260, 67 Fed. Reg. 59,033 (Sept. 19, 2002); 68 Fed. Reg. 25,822, 25,823 (May 14, 2003). Suppl. Br. at 3-4. According to those documents, VA does not consider Note 2

to be a "substantive change" but merely a clarification or "restatement" of that DC. As G.C. Prec. 2-2003 states:

> As was stated in the notice of proposed rulemaking: "This amendment involves no substantive change and is consistent with current practice." 67 Fed. Reg. at 59,033. Thus, the amendment restated in more explicit terms the rule reflected in prior VA regulations that only a single 10% rating for tinnitus is authorized regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head.

G.C. Prec. 2-2003. The Secretary asserts further that the interpretation provided by Note 2 "is a reasonable interpretation based on the common medical definition of tinnitus and should be given deference by the Court". Suppl. Br. at 5. As support for this assertion, he cites to VA's Supplementary Information, published in conjunction with the proposed rule, which stated that "true tinnitus . . . appears to arise from the brain rather than the ears" and that true (subjective) tinnitus is "a central nervous system condition", 67 Fed. Reg. at 59,033. As the medical authority for this assertion regarding tinnitus being a central-nervous-system disorder, the Secretary cites to the Supplementary Information published in explanation of the proposed and final rule change. Suppl. Br. at 5 (citing 67 Fed. Reg. at 59,033 and 68 Fed. Reg. at 25,822). The Secretary then concludes:

> Because tinnitus is a central nervous system disorder, rather than a disorder of the ears, the sound that Mr. Smith perceives in each ear is in reality a single disability existing in his central nervous system. Section 4.25(b)'s reference to "disabilities arising from a single disease entity" has no application in this case because he has

> only a single disability, a disability of the nervous system.

Ibid. At oral argument, when asked what was the medical basis for the central-nervous-system thesis, the Secretary's counsel could not provide any citation to authority. Finally, the Secretary contends that VA's interpretation should control here because an agency's interpretation of its own regulation is entitled to "substantial deference", unless that interpretation is " 'plainly erroneous or inconsistent with the regulation.' " Suppl. Br. at 4 (quoting *Westberry v. Principi*, 255 F.3d 1377, 1382 (Fed. Cir. 2001)).

III. Analysis

A. Applicable Law and Regulation

At the time of the BVA decision here on appeal, section 1155 of title 38 of the U.S. Code provided, and provides now, in relevant part:

> **§ 1155. Authority for schedule for rating disabilities**
>
> The Secretary shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent, and total, 100 percent. The Secretary shall from time

> to time readjust this schedule of ratings in accordance with experience. However, in no event shall such a readjustment in the rating schedule cause a veteran's disability rating in effect on the effective date of the readjustment to be reduced unless an improvement in the veteran's disability is shown to have occurred.

38 U.S.C. § 1155. Section 7252 of title 38 also provided then as it does now:

> **§ 7252. Jurisdiction; finality of decisions**
>
> (b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.

38 U.S.C. § 7252(b). At the time of the filing of the original claim that gave rise to the decision here on appeal, title 38 of the Code of Federal Regulations provided in relevant part:

> **§ 4.25 Combined ratings table**
>
> . . . .
>
> (b) Except as otherwise provided in this schedule, the diseases arising from a single disease entity, e.g., arthritis, multiple sclerosis, cerebrovascular accident, etc., are to be rated separately, as are all other disabling conditions, if any. All disabilities are then combined as described in paragraph (a) of this section. The conversion to the nearest degree divisible by 10 will be done only once per rating decision, will

combine the rating of all disabilities, and will be the last procedure in determining the combined degree of disability.

* * * * *

§ 4.87 Schedule of ratings – ear.

DISEASES OF THE EAR	Rating
. . .	
6260 Tinnitus: Persistent as a symptom of head injury, concussion or acoustic trauma	10
Effective from June 10, 1999, the Secretary amended 6260 to provide:	
6260 Tinnitus, recurrent	10

64 Fed. Reg. at 25,202; 38 C.F.R. § 4.87, DC 6260 (2000). Effective June 13, 2003, the Secretary added the following note at the end of DC 6260:

> Note (2): Assign only a single evaluation for recurrent tinnitus, whether the sound is perceived in one ear, both ears, or in the head.

68 Fed. Reg. at 25,822; 38 C.F.R. § 4.87, DC 6260 (2004).

B. Pre-1999 Rating

1. Jurisdiction

In *Smith II*, the Federal Circuit reversed our determination that we had jurisdiction to review the Board's interpretation of "persistent" in DC 6260 because our

"decision [had] relied heavily on [our] *Wanner I* decision", which the Federal Circuit had reversed in terms of its jurisdictional holding. *Smith II*, 108 Fed. Appx. 628, [WL] at *1; *see Wanner I* and *Wanner II*, both *supra*. The Federal Circuit then remanded this case to us "for further proceedings consistent with [its] decision in *Wanner* [*II*]." *Smith II, supra*. In *Wanner II*, the Federal Circuit held that this Court did not have jurisdiction to invalidate the pre-1999 DC 6260 trauma requirement as inconsistent with 38 U.S.C. § 1110, as we had done in *Wanner I*, 17 Vet. App. at 18. *Wanner II*, 370 F.3d at 1131. The Federal Circuit also stated in *Wanner II*: "The Secretary's discretion over the [rating] schedule, including procedures followed and content selected, is insulated from judicial review with one recognized exception limited to constitutional challenges." *Ibid.* (language preceded by citation to *Johnson v. Robison*, 415 U.S. 361, 39 L. Ed. 2d 389, 94 S. Ct. 1160 (1974), for constitutional exception).

Nineteen days after *Wanner II* was decided, the Federal Circuit issued its opinion in *Sellers, supra*. In *Sellers*, the Federal Circuit, making no reference to its opinion in *Wanner II*, concluded that this Court had jurisdiction to review "the correct interpretation of [38 C.F.R. §] 4.130, specifically the relationship between the [*Diagnostic and Statistical Manual of Mental Disorders IV* (DSM-IV) (with which the preambulatory language in § 4.130 directs rating agencies to be "thoroughly familiar . . . [in order] to properly implement the general rating formula")] and the general rating formula" for mental disorders set forth at the end of § 4.130. *Sellers*, 372 F.3d at 1324. The Federal Circuit thrice distinguished the review undertaken there from review of "the content of the rating criteria", which "neither we nor the . . . Court [of

Appeals for Veterans Claims] may review." *Ibid.* The dissenting judge in *Sellers* agreed with the majority's distinction between review of the Board's interpretation of a regulation, which is permissible, and the review of "the content of the ratings schedule", which is not, but disagreed that what the appellants sought there amounted to review of interpretation rather than of content. *Id.* at 1329.

Based on *Sellers*, we conclude that the review sought here by the appellant involves the Board's decision to interpret "persistent" in pre-1999 DC 6260 as requiring that tinnitus have an element of constancy in order to be compensable. The nature of that review is not distinguishable from the review sought in *Sellers*, which the Federal Circuit characterized as involving the issue whether "the regulation [§ 4.130] requires that VA consider symptoms of [post-traumatic stress disorder (PTSD)] contained in the DSM-IV and make findings of fact as to whether a veteran suffered increased occupational and social impairment [(a criterion in the general rating formula)] as consequences of the severity of those [DSM-IV] symptoms." *Id.* at 1324. We recognize that the Federal Circuit's remand in *Smith II* for further proceedings here directed that we act in a manner "consistent with" *Wanner II* and did not refer to *Sellers*. However, we believe that we must read *Wanner II* in light of *Sellers*, and, so synthesizing the applicable precedents, we conclude that the issue before us today is the correct interpretation of a rating-schedule regulation, as in *Sellers*, and not a direct challenge to the content of a rating-schedule regulation, as in *Wanner II*. We note further that the Federal Circuit's remand in *Smith II* was premised on the fact that we had "relied heavily" on *Wanner I* in finding jurisdiction previously; in contrast, we

rely now on the Federal Circuit's pronouncements in *Wanner II* and *Sellers*, for the holding that we have jurisdiction over the question presented by the appellant regarding the correct interpretation of "persistent" in the pre-1999 DC 6260.

2. Merits

As previously noted, the appellant seeks reversal of the Board's determination that he did not satisfy the "persistent" criterion for a 10% rating under pre-1999 DC 6260, but alternatively argues that the Board's statement of reasons or bases is inadequate and that the matter should be remanded. The Secretary agrees that the Board's statement of reasons or bases is inadequate (Suppl. Br. at 3) and at oral argument contended that the matter should be remanded but not reversed. For the following reasons, the Court agrees with the parties that the Board's statement of reasons or bases is inadequate and that the matter should be remanded so that the Board may provide an adequate statement of reasons or bases.

In his briefing to the Court, the Secretary notes that the Board decision in the instant case failed to explain adequately the basis for its interpretation of "persistent" as applied to the evaluation of tinnitus under pre-1999 DC 6260. Suppl. Br. at 3. The Board reached its decision (1) without referring to the Secretary's conclusion that an attribute of constancy was not well suited for rating a condition that, "under certain circumstances, comes and goes", 59 Fed. Reg. at 17,297; (2) by paraphrasing only selectively from the Secretary's 1994 Supplementary Information, *ibid.*; and (3) by basing its conclusion solely on one dictionary definition of "persistent" (R. at 8). *See*

Theiss, 18 Vet. App. at 210-11 (criticizing General Counsel precedent opinion, upon which Board had relied, for "selective use of a narrow set of definitions"); *see also Suozzi v. Brown*, 10 Vet. App. 307, 311 (1997) (holding that Secretary "defines 'corroboration' far too narrowly" in interpreting 38 C.F.R. § 3.304(f)). In this regard, the Court notes that "persistent" is defined generally as, inter alia, "continuing" and "constantly repeated", whereas "recurrent" is defined generally as, inter alia, "appearing or occurring again or periodically," WEBSTER'S NEW WORLD DICTIONARY 1007, 1123 (3d ed.1988), and that the Secretary has provided no regulatory guidance as to the meaning of either "persistent" in pre-1999 DC 6260 or "recurrent" in current DC 6260; for example, neither is defined or explained in terms of the frequency required to satisfy the rating criteria. *Cf., e.g.*, 38 C.F.R. §§ 4.88b, DC 6354 (providing ratings for chronic fatigue syndrome based on specific degree and length of periods of incapacitation), 4.97, DC 6514 (providing ratings for sinusitis based on specific number, degree, and length of episodes), 4.114, DC 7305 (providing "mild", "moderate", "moderately severe", and "severe" ratings for ulcers based on specific frequency and length of symptoms) (2004).

In addition, the Board failed to address the Secretary's comments in the 1994 Supplementary Information (which explained the proposal (adopted in 1999) that changed "persistent" to "recurrent" and eliminated the trauma requirement) suggesting that the Secretary had concluded that, to the extent that "persistent" as used in the pre-1999 DC 6260 includes a meaning of "constant", it is unrealistic to use "persistent" for evaluating tinnitus, and that a meaning of occurring at "regular intervals" is

the correct evaluation criterion. Specifically, the Secretary stated:

> The evaluation for tinnitus ([DC] 6260) currently requires that the condition be "persistent" in order to qualify for a 10 percent evaluation. Tinnitus is a subjective sensation which, under certain circumstances, comes and goes. The word "persistent" suggests a meaning of ["]constant["], and we propose to replace it with "recurrent," meaning that the tinnitus might not always be present, but that it does return at regular intervals. ***Requiring that tinnitus be "recurrent" will allow a realistic evaluation of the typical disablement from this condition.***

59 Fed. Reg. at 17,297 (emphasis added). Although the Secretary attempts to explain in his supplemental memorandum of law, without any supporting authority, that the "requirement of persistence was based, as far as practicable, upon the average impairment of earning capacity from tinnitus as it was understood when the regulation was promulgated many years ago", and that "the rating schedule was readjusted to reflect advances in medical knowledge and to accord with evolving understandings of the average impairment of earning capacity occasioned by hearing loss and other conditions" (Suppl. Mem. at 10-11), the Board did not set forth any such rationale; it is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court. *See Wanless v. Principi*, 18 Vet. App. 337, 343 (2004) (Steinberg, J., concurring) (noting that "Court's role is to review whether the Board in its decision, rather than the Secretary in his brief, provided an adequate statement of reasons or bases"). Finally, the Board also failed to consider and apply, as appropriate, the basic canon of construction that

"interpretive doubt is to be resolved in the veteran's favor" when a regulatory term is found to be ambiguous and there is no regulatory history to shed light on its meaning. *Brown v. Gardner*, 513 U.S. 115, 118, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994); *see Otero-Castro v. Principi*, 16 Vet. App. 375, 380 (2002) (applying above *Gardner* rule to resolve ambiguity in DCs in favor of claimant).

Because of the Board's failure to address the above matters, the Court cannot adequately review the appellant's claim for reversal or otherwise carry out effective judicial review of the Board's denial of a compensable rating for his tinnitus under pre-1999 DC 6260. Accordingly, the matter will be remanded. *See* 38 U.S.C. § 7104(a), (d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995) (noting that Board is required to provide adequate written statement of reasons or bases for its findings and conclusions on all material issues of fact and law presented on record; statement must be adequate to enable claimant to understand precise basis for its decision, as well as to facilitate review in this Court); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990) (same).

C. Relationship Between § 4.25(b) and DC 6260

1. Jurisdiction

Before we may consider the appellant's contentions regarding the correct interpretation of § 4.25(b), we must address the question of the Court's jurisdiction over this question. Again, we conclude that what the appellant has asked us to do here is not a direct review of the content of the rating schedule, which *Wanner II* and section 7252(b) proscribes, but rather a review of the Board's

interpretation of two regulatory provisions and their interrelationship. This is exactly what was involved in *Sellers*, where the appellant was asserting that the § 4.130 language of the preambulatory general reference to the DSM-IV nomenclature required that the specific DSM-IV nomenclature pertaining to PTSD prevail over the "General Rating Formula for Mental Disorders" that applied to PTSD under [38 C.F.R. § 4.130,] DC 9411 [2000,] as well as to 35 other specified mental disorders. *Sellers*, 372 F.3d at 1322 (characterizing appellant's contention as "that in . . . § 4.130 VA adopted the definition of PTSD contained in the DSM-IV" and thus VA must "look to the DSM-IV to properly determine whether a veteran has total occupational and social impairment that results from his or her service-connected [PTSD] disability"). Hence, we hold that we have jurisdiction to address the merits of the appellant's reversal contention on this issue.

2. Merits

In this case, the Board concluded that "the 10[%] rating being granted in this decision is the only schedular evaluation available for tinnitus, and there are no other diagnostic codes potentially applicable to this disorder." R. at 9. At oral argument, counsel for the Secretary represented that a remand on this issue would be pointless because the Board on remand would have to apply G.C. Prec. 2-2003, which concluded that under the DC for tinnitus (DC 6260) no more than a 10% rating was generally available. *See* 38 U.S.C. § 7104(c) (providing that Board bound to follow precedent opinions of the General Counsel). Accordingly, the Court will address the merits.

At the outset, we note that, although the Board is bound by the precedent opinions of the VA General Counsel, this Court is not so bound. *See, e.g., Hatch v. Principi*, 18 Vet. App. 527, 531 (2004) (citing *Theiss*, 18 Vet. App. at 210, *Cottle v. Principi*, 14 Vet. App. 329, 335 (2001), and *Sabonis v. Brown*, 6 Vet. App. 426, 429 (1994)); *see also* 38 U.S.C. §§ 7104(c), 7261. The Court reviews the Secretary's interpretation of law de novo. *See Hatch*, *supra*.

After reviewing the Secretary's analysis of the rating schedule with regard to tinnitus, the Court concludes that he failed to take account of a basic canon of construction, specifically, to look to the plain text of the regulation. "The basic principles that apply to construing statutes apply equally to construing regulations. 'The starting point in interpreting a statute is its language.'" *Otero-Castro, supra* (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409, 124 L. Ed. 2d 368, 113 S. Ct. 2151 (1993)) (internal citations omitted). Here, the Secretary's interpretation cannot stand because it conflicts with the plain meaning of the regulation. *See DeLuca v. Brown*, 8 Vet. App. 202, 207 (1995) (holding that interpretation of regulation by VA that conflicted with plain meaning of regulation not entitled to deference) (citing *Combee v. Principi*, 4 Vet. App. 78, 91 (1993) (quoting *Martin*, 499 U.S. at 151), *rev'd on other grounds sub. nom. Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994)).

The Secretary stresses that none of the provisions in the section of the rating schedule relating to ears address dual ratings, with the exception of DC 6207 regarding auricles, which specifically provides for different ratings depending on whether one or both auricles are a complete loss. From these observations, the Secretary derives the following interpretive principle:

> Where separate ratings are permitted for like organs, the rating code explicitly provides for such. *See, e.g.*, 38 C.F.R. § 4.87, DC 6207 (Loss of auricle); [ ] § 4.115(b) (Testis, atrophy complete), and DC 7524 (Testis, removal); [ ] § 4.16, DC 7626 (Breast, surgery of). If the Secretary had intended to provide separate ratings for tinnitus in the schedule of ratings related to ears, he would have employed specific language to do so, as he did for rating disability of the auricles (DC 6207).

Sec'y Br. at 7. Stated another way, the Secretary concludes that the drafters knew how to draft the regulations to specify when each ear should be rated separately and, further, that the absence of any such statement showed a clear intention to exclude individual ratings for each ear. R. at 8-9. An examination of the plain text of the regulation, however, reveals that dual ratings for tinnitus were not intended to be excluded.

As the appellant argues, § 4.25(b) provides the general rule for rating disabilities arising from a single disease entity. That regulation states: "***Except as otherwise provided in this schedule,*** the disabilities arising from a single ***disease*** entity . . . ***are to be rated separately*** as are all other disabling conditions, if any. All disabilities then are to be combined [for rating purposes]. . . ." 38 C.F.R. § 4.25(b) (emphasis added). Accordingly, under the plain reading of the regulation, each service-connected disability arising from a single ***disease*** entity is to be rated separately, and the ratings combined, unless otherwise provided by the Secretary. *See Colayong v. West*, 12 Vet. App. 524, 531 (1999); *Esteban v. Brown*, 6 Vet. App. 259, 261 (1994).

Although the Secretary correctly states that "neither the prior nor the amended regulation contained any language suggesting that a separate tinnitus rating could be awarded for each ear", G.C. Prec. 2-2003, this is not the test. An examination of DC 6260 reveals that tinnitus is listed as a ***disease*** of the ear – making the provisions of § 4.25(b) applicable thereto as a "single disease entity" – and that the rating schedule contains no exception to § 4.25(b) regarding tinnitus; that is, nothing in the rating schedule limits a veteran with tinnitus in both ears to only one rating. The plain reading and application of § 4.25(b) and DC 6260 results in a rating of 10% for each ear affected by a single case of tinnitus and then a combination of those ratings. There is no need to look further to discern the meaning of the regulation. "Where a statute's language is plain, and its meaning clear, no room exists for construction. There is nothing to construe." *Gardner v. Derwinski*, 1 Vet. App. 584, 588 (1991), *aff'd sub nom. Gardner v. Brown*, 5 F.3d 1456 (Fed. Cir. 1993), *aff'd*, 513 U.S. 115, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994). "If the intent of Congress is clear, that is the end of the matter." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The quoted language from *Gardner* and *Chevron* applies equally to regulations. *See Otero-Castro, supra; Savage v. Gober*, 10 Vet. App. 488, 495 (1997); *see also Lee v. West*, 13 Vet. App. 388, 394 (2000).

Assuming, arguendo, that the regulation's language was not plain, the Court does not agree with the Secretary's contention that an examination of other DCs shows an intent of the drafters to exclude dual ratings unless the DC expressly provides for such dual rating. The Court has not found in other parts of the rating schedule support for

the Secretary's basic assertion with regard to § 4.25(b). Although, on first impression, the rating schedule for loss of hearing, which provides expressly for dual ratings, seems to support the Secretary's assertion that "where separate ratings are permitted for like organs, the rating code explicitly provides for such", upon further examination, we conclude that support for that assertion is wanting. For example, 38 C.F.R. §§ 4.85 and 4.86, relating to "Evaluation of hearing impairment" and "Exceptional patterns of hearing impairment", both provide for dual ratings; however, both of these sections rate only ***impairment*** without regard to an underlying disease. *See* 38 C.F.R. §§ 4.85 and 4.86 (2004). Section 4.25(b), which by its very terms requires separate ratings for each ***disability*** arising from a single ***disease*** entity, does not apply to §§ 4.85 and 4.86, and the drafters thus were required to provide specifically for dual ratings if they wanted that result. Accordingly, §§ 4.85 and 4.86, which explicitly permit dual ratings for hearing loss, provide no insight into whether such ratings are permitted for disability ratings based on an ear ***disease.***

The Secretary points to the fact that within the rating schedule for "Diseases of the Ear" in § 4.87a (which includes tinnitus), the schedule specifically provides a higher rating for the loss of both auricles as opposed to the loss of only one, where no such dual rating was specifically provided for the other diseases listed in that section, including tinnitus. Br. at 7-8. The Secretary concludes from this that the drafters of the schedule meant to preclude a dual rating for the other ear diseases in that section, including tinnitus. *Ibid.* Even if this interpretation was not contrary to the plain text of the regulation, which it is, it is still suspect. As previously noted, § 4.25(b)

provides for separate ratings for disabilities arising from a "single disease entity". If a distinct rating had not been provided for the loss of both auricles, the application of § 4.25(b) would have required a 30% rating for the loss of one ear and an additional 30% rating for the loss of the second ear; these would then have been combined with each other and with ratings for other disabilities. Instead, the drafters provided a rating of 30% for the complete loss of one auricle and 50% for the loss of both. The Court finds it more likely than not that these separate ratings were provided specifically to preclude the application of § 4.25(b), which would have resulted in a slightly higher combined rating of 51%, *see* 38 C.F.R. § 4.25(b) (Table I), than for the purpose of providing interpretative assistance in assessing whether a dual rating was required for a disability arising from the other ear diseases. (We note that, although 38 C.F.R. § 4.25(b) provides that a 51% rating is to be rounded to 50%, the rating schedule for loss of auricles does not reflect merely what would have been provided under 4.25(b). A 51% rating may potentially affect a claimant's disability rating when combined with ratings from other disabilities. As § 4.25(b) provides, the rounding procedure for reaching a combined rating will be applied only once, after all the ratings are combined. *See* 38 C.F.R. § 4.25(b).)

Finally, regarding the interpretation of the rating schedule, the schedule for diseases of the eye reveals that the drafters of the schedule knew exactly how to make exceptions from the application of § 4.25(b) for disabilities arising from a disease. For example, 38 C.F.R. § 4.84(a), DC 6011 (2004), specifically states that atrophy of the retina, a disease of the eye, is limited to only one rating, whether unilateral or bilateral. Such a limitation simply

does not exist in the applicable DC for tinnitus (DC 6260), and it appears doubtful that one could be added to the detriment of the veteran once he filed his claim, either by interpretative analysis or amended regulation. *See Fortuck v. Principi*, 17 Vet. App. 173, 178 (2003); *Karnas v. Derwinksi*, 1 Vet. App. 308, 312-13 (1991), *overruled in part on other grounds by Kuzma v. Principi*, 341 F.3d 1327, 1329 (Fed. Cir. 2003); *see also* 38 U.S.C. § 1155 (stating that Secretary may not revise rating schedule so as to reduce veteran's disability rating then in effect unless an improvement in veteran's disability is shown).

As to the Secretary's assertion that Note 2 "involves no substantive change" and that "the amendment restated in more explicit terms the rule reflected in prior VA regulations that only a single 10% rating for tinnitus is authorized", this interpretation not only is inconsistent with the plain meaning of the applicable regulation in this case, but also the support for this assertion is flawed. Both the Secretary and the General Counsel quote the Supplementary Information published in the Federal Register at the time of the promulgation of the final rule, which stated in relevant part:

> To rate each ear separately for this single disability would violate the prohibition on pyramiding, 38 CFR 4.14. Similarly, to rate each ear separately would be a violation of the principle of 38 CFR 4.25(b) that a "***single disease entity" is to be given a single rating.*** A single evaluation for a single disability is appropriate. We have made no change based on this comment.

68 Fed. Reg. at 25,823 (emphasis added). The above-quoted passage misstates the law. In fact, this passage states nearly the opposite of what § 4.25(b) provides,

which is that "the ***disabilities arising from a single disease entity . . . are to be rated separately***". 38 C.F.R. § 4.25(b) (emphasis added). Hence, pursuant to the review standard set forth in *Westberry*, the Court owes no deference to such an interpretation, because it is both "plainly erroneous" and "inconsistent with [VA]'s own regulation" as provided in § 4.25(b). *Westberry, supra.*

The Secretary asserts (both in his brief and at oral argument) that the policy embodied in Note 2 had been the "standard practice" for VA "since 1945", and that VA's interpretation of DC 6260 – that such a policy had always been a part of the tinnitus rating – should be given deference by the Court because it is "reasonable" and "based on the common medical definition of tinnitus". Suppl.Br. at 5. However, the Secretary concedes (also at oral argument) that neither the "standard practice" of awarding only a single 10% rating for tinnitus nor the "common medical definition of tinnitus" that considered that condition a disability of the central nervous system, was set forth in a publicly available document before VA's proposed rule in 2002. Hence, even if the regulations in this case were ambiguous, the Court would find the argument that Note 2 embodied either a "standard VA practice" or an established agency policy based on a "common medical definition" to be unpersuasive. As the Secretary also conceded at oral argument, the paucity of information in regard to this "standard VA practice" available prior to the Board's December 2000 decision in this case distinguishes this case from *Smiley v. Citibank*, 517 U.S. 735, 135 L. Ed. 2d 25, 116 S. Ct. 1730 (1996), which affirmed the validity of an agency regulation that had formally recognized a longstanding agency interpretation. Unlike in the instant case, in *Smiley*, the agency had a publicly available track

record of having interpreted an ambiguous term in a manner consistent with the new regulation. Finally, to the extent that there is any reasonable interpretive doubt regarding the meaning of § 4.25(b) and its application to DC 6260, and given the lack of any publicly available agency interpretative history on this matter, such doubt is to be resolved in favor of the veteran. *See Brown v. Gardner*, 513 U.S. at 117-18; *Allen (William) v. Brown*, 7 Vet. App. 439, 446-48 (1995) (en banc) (applying *Gardner* "interpretive doubt" rule); *Otero-Castro, supra.*

Based on the plain language of the regulations, the Court holds that the pre-1999 and pre-June 13, 2003, versions of DC 6260 required the assignment of dual ratings for bilateral tinnitus. In light of this holding, the Court will reverse as "not in accordance with law", 38 U.S.C. § 7261(a)(3)(A), the Board's conclusion that "the 10[%] rating being granted . . . is the only schedular evaluation available for tinnitus", set aside the determination that no higher rating is available to the appellant, and remand that matter for further proceedings consistent with this opinion.

III. Conclusion

Upon consideration of the parties' pleadings, oral argument, and the forgoing analysis, the Court reverses the December 2000 BVA decision that bilateral tinnitus may not qualify for two 10% ratings, one for each ear, and remands that matter for expeditious readjudication as to whether the appellant has bilateral tinnitus, and, if so, for assignment of a rating consistent with this opinion. Additionally, the Court vacates the December 2000 BVA decision with respect to the Board's decision to interpret

"persistent" in pre-1999 DC 6260 as requiring an element of constancy, and remands that matter for readjudication and for consideration of our holding regarding § 4.25(b) to pre-1999 DC 6260. Furthermore, the Court invalidates G.C. Prec. 2-2003 to the extent that it is inconsistent with § 4.25(b) and pre-June 2003 DC 6260 as herein construed. On remand, the Secretary will ensure expeditious appropriate further development and issuance of a readjudicated decision supported by an adequate statement of reasons or bases, *see* 38 U.S.C. §§ 1110, 5100-5103, 5103A, 5107, 7104(a), (d)(1); 38 C.F.R. § 4.25(b), 4.87, DC 6260 (pre-1999 and pre-June 13, 2003), all consistent with this opinion and in accordance with 38 U.S.C. § 7112 (as added by the Veterans Benefits Act of 2003, Pub.L. No. 108-183, § 707(b), 117 Stat. 2651, 2673) (requiring Secretary to "take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court"); *see Vargas-Gonzalez v. Principi*, 15 Vet. App. 222, 225-30 (2001) (holding that section 302 of Veterans' Benefits Improvements Act of 1994, Pub.L. No. 103-446, § 302, 108 Stat. 4645, 4658, predecessor of section 7112, applies to all elements of claim remanded by the Court or Board), and in accordance with all applicable law and regulation. *See Allday*, 7 Vet. App. at 533-34. On remand, the appellant will be free to submit additional evidence and argument on the remanded claims, and the Board is required to consider any such evidence and argument. *See Kay v. Principi*, 16 Vet. App. 529, 534 (2002). A remand by this Court or by the Board confers on an appellant the right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. *See Stegall v. West*, 11 Vet. App. 268, 271 (1998). A final decision by the Board

following the remand herein ordered will constitute a new decision that, if adverse, may be appealed to this Court only upon the filing of a new Notice of Appeal with the Court not later than 120 days after the date on which notice of the Board's new final decision is mailed to the appellant. *See Marsh v. West*, 11 Vet. App. 468, 472 (1998).

REVERSED IN PART, VACATED IN PART, AND REMANDED.

CONCUR BY: IVERS (In Part)

DISSENT BY: IVERS (In Part)

DISSENT:

IVERS, *Chief Judge*, concurring in part and dissenting in part: I must respectfully dissent from the majority opinion with respect to the issue of the Court's jurisdiction as discussed in III.B.1. The Court has jurisdiction to determine its jurisdiction over a case. *See Henderson v. West*, 12 Vet. App. 11 (1998). In my view, the majority's decision to remand the question of the appellant's entitlement to a compensable rating under the pre-1999 DC 6260 is outside this Court's jurisdiction pursuant to 38 U.S.C. §§ 502 and 7252(b) and contrary to the Federal Circuit's decisions in *Wanner v. Principi*, 370 F.3d 1124 (Fed. Cir. 2004) (*Wanner II*) and *Smith v. Principi*, 108 Fed. Appx. 628, 2004 WL 2030123 (Fed. Cir. 2004) (*Smith II*).

In the case underlying the appeal before us, the Federal Circuit granted the Secretary's motion to vacate and remand this Court's decision in *Smith v. Principi*, 17 Vet. App. 168 (2003) (*Smith I*) as inconsistent with *Wanner II*. *See Smith II*. In so doing, the Federal Circuit stated:

> In *Wanner* [*II*], we reversed the Court of Appeals for Veterans Claims' determination that it had jurisdiction to review the rating schedule, absent a constitutional challenge. In the instant case, the decision on appeal relied heavily on the Court of Appeals for Veterans Claims' *Wanner* decision [*Wanner v. Principi*, 17 Vet. App. 4 (2003) (*Wanner I*)] in concluding that it had jurisdiction to review the Diagnostic Code, which is included in the ratings schedule. Thus, we reverse the Court of Appeals for Veterans Claims' determination in this case that it had jurisdiction and remand for further proceedings consistent with our decision in *Wanner* [*II*].

Smith II, 108 Fed. Appx. 628, [WL] at *2. In concluding that this Court did not have jurisdiction to review the ratings schedule, the Federal Circuit in *Wanner II* reviewed the jurisdictional provisions of title 38, 38 U.S.C. §§ 502 and 7252(b). 370 F.3d at 1129. Section 502 specifically excludes from judicial review by this Court actions of the Secretary "relating to the adoption or revision of the schedule of ratings for disabilities adopted under section 1155 of this title." 38 U.S.C. § 502; *see also id.* In addition, section 7252(b) states that this Court "may not review the schedule of ratings for disabilities adopted under section 1155 of this title *or any action of the Secretary in adopting or revising that schedule.*" 38 U.S.C. § 7252(b) (emphasis added); *see also id.* Noting that "the clarity of the legislative scheme makes resort to the legislative history [of the Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988)] unnecessary," the Federal Circuit added:

> Senate Report 100-418 explains: "The Committee bill contains one restriction on the scope of review of VA rules and regulations: *A court would*

> *not be permitted to direct or otherwise order that any part of the disability rating schedule issued or adopted by the Administrator be modified.*" . . . A report from the House of Representatives reflects a similar understanding, explaining that, in response to "apprehension . . . that the VA schedule for rating disabilities . . . would be destroyed by piecemeal review of individual rating classifications," the bill "*has expressly precluded review of the schedule. . . .* " H.R. Rep. 100-963 at 28. The language in the legislative history is not limited to the percentages of the disability ratings . . . but matches the statutes in broadly precluding judicial review of the contents of the disability rating schedule in toto.

370 F.3d at 1130 (emphasis added). The Federal Circuit concluded that the "review undertaken by the Veterans Court here amounts to a direct review of the content of the rating schedule" and "was an action outside of its jurisdiction as provided by 38 U.S.C. § 7252(b)." 370 F.3d at 1131.

The majority presently claims that it is not reviewing the contents of the rating schedule, but "the Board's interpretation of 'persistent' in pre-1999 DC 6260," and, consequently, this review is "not distinguishable from the review sought in *Sellers*." *Ante* at 10. However, the Court's analysis here moves well beyond the interpretation of the ratings criteria as discussed in *Sellers*. In that case, the Federal Circuit upheld this Court's "interpretation of 38 C.F.R. § 4.130 with respect to the relationship between the DSM-IV and the general rating formula." 372 F.3d at 1321. With respect to the issue of this Court's jurisdiction, the Federal Circuit focused on the character of the arguments raised by the appellants: "Appellant's are challenging VA's interpretation of a regulation. The Veterans Court,

therefore, had jurisdiction under 38 U.S.C. § 7252(a)." 372 F.3d at 1324.

The crucial difference between *Sellers* and this case is that the appellants in *Sellers* were not challenging the content of the ratings schedule insofar as the ratings schedule reflected the medically recognized symptoms of PTSD. The Secretary's instruction that "rating agencies must be thoroughly familiar with [the DSM-IV] to properly . . . apply the general rating formula for mental disorders in [section] 4.130" established an ambiguous relationship between the ratings criteria for PTSD and DSM-IV. The Court interpreted the limits of that relationship without reviewing "any action of the Secretary in adopting or revising that schedule." 38 U.S.C. § 7252(b).

While cloaking their actions in the reasons-and-bases rubric, the majority here dives directly into the content of the ratings schedule by evaluating the meaning of "persistent" in the pre-1999 DC 6260 and "recurrent" in the current DC 6260 against the medical definition of tinnitus. By proposing to examine the reasonableness of the terms "persistent" and "recurrent" as accurate symptoms of tinnitus, the Court is announcing its intent to directly review the contents of the ratings schedule and infringing on the Secretary's authority under 38 U.S.C. § 1155 to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries." *Sellers* is inapplicable in this case because the majority, in "interpreting" the meaning of "persistent" in the pre-1999 DC 6260 and "recurrent" in the current DC 6260, would engage in a "review [of] the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule." 38 U.S.C. § 7252(b). The Federal Circuit's

language in *Wanner II* is instructive: "The review undertaken by the Veterans Court here amounts to a direct review of the contents of the rating schedule and is indistinguishable from the review of 'what should be considered a disability' that the Veterans Court itself recognized as impermissible." 370 F.3d at 1131.

Moreover, it is irrelevant for jurisdictional purposes that the Court is remanding the issue to the Board. If the Court had jurisdiction, it would merely be postponing an eventual judicial review of an action "relating to the adoption or revision of the schedule of ratings for disabilities adopted under section 1155 of this title." 38 U.S.C. § 502. The only appropriate course of action in this case is to dismiss the claim as outside the Court's jurisdiction pursuant to 38 U.S.C. §§ 502 and 7252(b), and the Federal Circuit's decisions in *Wanner II* and *Smith II*.

United States Court of Appeals for the Federal Circuit

05-7168

ELLIS C. SMITH,

Claimant-Appellee,

v.

R. JAMES NICHOLSON, Secretary of Veterans Affairs,

Respondent-Appellant.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

in Case NO(S). 01-0623

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

REVERSED AND REMANDED

ENTERED BY ORDER OF THE COURT

DATED JUN 19 2006 /s/ Jan Horbaly sp

Jan Horbaly, Clerk

U.S. Const. Art. I, § 8, Cl 9

Sec. 8, Cl 9. Inferior tribunals.

To constitute Tribunals inferior to the supreme Court;

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38 U.S.C. § 7251. Status

There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.

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38 U.S.C. § 7252. Jurisdiction; finality of decisions

(a) The Court of Appeals for Veterans Claim [sic] shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

(b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title [38 USCS § 7261]. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title [38 USCS § 1155] or any action of the Secretary in adopting or revising that schedule.

(c) Decisions by the Court are subject to review as provided in section 7292 of this title [38 USCS § 7292].

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38 U.S.C. § 7261. Scope of review

(a) In any action brought under this chapter [38 USCS §§ 7251 et seq.], the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall –

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title [38 USCS § 7252(b)] and shall –

(1) take due account of the Secretary's application of section 5107(b) of this title [38 USCS § 5107(b)]; and

(2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

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38 U.S.C. § 7292. Review by United States Court of Appeals for the Federal Circuit

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title [38 USCS § 1155]) or any interpretation thereof (other than a determination as to a

factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeals to United States courts of appeals from United States district courts.

(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28 [28 USCS § 1254].

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28 [28 USCS § 2072].

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38 C.F.R. § 4.25 Combined ratings table.

Table I, Combined Ratings Table, results from the consideration of the efficiency of the individual as affected first by the most disabling condition, then by the less disabling condition, then by other less disabling conditions, if any, in the order of severity. Thus, a person having a 60 percent disability is considered 40 percent efficient. Proceeding from this 40 percent efficiency, the effect of a further 30 percent disability is to leave only 70 percent of the efficiency remaining after consideration of the first disability, or 28 percent efficiency altogether. The individual is thus 72 percent disabled, as shown in table I opposite 60 percent and under 30 percent.

(a) To use table I, the disabilities will first be arranged in the exact order of their severity, beginning with the greatest disability and then combined with use of table I as hereinafter indicated. For example, if there are two disabilities, the degree of one disability will be read in the left column and the degree of the other in the top row, whichever is appropriate. The figures appearing in the

space where the column and row intersect will represent the combined value of the two. This combined value will then be converted to the nearest number divisible by 10, and combined values ending in 5 will be adjusted upward. Thus, with a 50 percent disability and a 30 percent disability, the combined value will be found to be 65 percent, but the 65 percent must be converted to 70 percent to represent the final degree of disability. Similarly, with a disability of 40 percent, and another disability of 20 percent, the combined value is found to be 52 percent, but the 52 percent must be converted to the nearest degree divisible by 10, which is 50 percent. If there are more than two disabilities, the disabilities will also be arranged in the exact order of their severity and the combined value for the first two will be found as previously described for two disabilities. The combined value, exactly as found in table I, will be combined with the degree of the third disability (in order of severity). The combined value for the three disabilities will be found in the space where the column and row intersect, and if there are only three disabilities will be converted to the nearest degree divisible by 10, adjusting final 5's upward. Thus, if there are three disabilities ratable at 60 percent, 40 percent, and 20 percent, respectively, the combined value for the first two will be found opposite 60 and under 40 and is 76 percent. This 76 will be combined with 20 and the combined value for the three is 81 percent. This combined value will be converted to the nearest degree divisible by 10 which is 80 percent. The same procedure will be employed when there are four or more disabilities. (See table I).

(b) Except as otherwise provided in this schedule, the disabilities arising from a single disease entity, e.g., arthritis, multiple sclerosis, cerebrovascular accident, etc.,

are to be rated separately as are all other disabling conditions, if any. All disabilities are then to be combined as described in paragraph (a) of this section. The conversion to the nearest degree divisible by 10 will be done only once per rating decision, will follow the combining of all disabilities, and will be the last procedure in determining the combined degree of disability.

Table I – Combined Ratings Table

[10 combined with 10 is 19]

	10	20	30	40	50	60	70	80	90
19	27	35	43	51	60	68	76	84	92
20	28	36	44	52	60	68	76	84	92
21	29	37	45	53	61	68	76	84	92
22	30	38	45	53	61	69	77	84	92
23	31	38	46	54	62	69	77	85	92
24	32	39	47	54	62	70	77	85	92
25	33	40	48	55	63	70	78	85	93
26	33	41	48	56	63	70	78	85	93
27	34	42	49	56	64	71	78	85	93
28	35	42	50	57	64	71	78	86	93
29	36	43	50	57	65	72	79	86	93
30	37	44	51	58	65	72	79	86	93
31	38	45	52	59	66	72	79	86	93
32	39	46	52	59	66	73	80	86	93
33	40	46	53	60	67	73	80	87	93
34	41	47	54	60	67	74	80	87	93
35	42	48	55	61	68	74	81	87	94
36	42	49	55	62	68	74	81	87	94
37	43	50	56	62	69	75	81	87	94
38	44	50	57	63	69	75	81	88	94
39	45	51	57	63	70	76	82	88	94
40	46	52	58	64	70	76	82	88	94
41	47	53	59	65	71	76	82	88	94
42	48	54	59	65	71	77	83	88	94
43	49	54	60	66	72	77	83	89	94

44	50	55	61	66	72	78	83	89	94
45	51	56	62	67	73	78	84	89	95
46	51	57	62	68	73	78	84	89	95
47	52	58	63	68	74	79	84	89	95
48	53	58	64	69	74	79	84	90	95
49	54	59	64	69	75	80	85	90	95
50	55	60	65	70	75	80	85	90	95
51	56	61	66	71	76	80	85	90	95
52	57	62	66	71	76	81	86	90	95
53	58	62	67	72	77	81	86	91	95
54	59	63	68	72	77	82	86	91	95
55	60	64	69	73	78	82	87	91	96
56	60	65	69	74	78	82	87	91	96
57	61	66	70	74	79	83	87	91	96
58	62	66	71	75	79	83	87	92	96
59	63	67	71	75	80	84	88	92	96
60	64	68	72	76	80	84	88	92	96
61	65	69	73	77	81	84	88	92	96
62	66	70	73	77	81	85	89	92	96
63	67	70	74	78	82	85	89	93	96
64	68	71	75	78	82	86	89	93	96
65	69	72	76	79	83	86	90	93	97
66	69	73	76	80	83	86	90	93	97
67	70	74	77	80	84	87	90	93	97
68	71	74	78	81	84	87	90	94	97
69	72	75	78	81	85	88	91	94	97
70	73	76	79	82	85	88	91	94	97
71	74	77	80	83	86	88	91	94	97
72	75	78	80	83	86	89	92	94	97
73	76	78	81	84	87	89	92	95	97
74	77	79	82	84	87	90	92	95	97
75	78	80	83	85	88	90	93	95	98
76	78	81	83	86	88	90	93	95	98
77	79	82	84	86	89	91	93	95	98
78	80	82	85	87	89	91	93	96	98
79	81	83	85	87	90	92	94	96	98
80	82	84	86	88	90	92	94	96	98
81	83	85	87	89	91	92	94	96	98

82	84	86	87	89	91	93	95	96	98
83	85	86	88	90	92	93	95	97	98
84	86	87	89	90	92	94	95	97	98
85	87	88	90	91	93	94	96	97	99
86	87	89	90	92	93	94	96	97	99
87	88	90	91	92	94	95	96	97	99
88	89	90	92	93	94	95	96	98	99
89	90	91	92	93	95	96	87	38	99
90	91	92	93	94	95	96	97	98	99
91	92	93	94	95	96	96	97	98	99
92	93	94	94	95	96	97	98	98	99
93	94	94	95	96	97	97	98	99	99
94	95	95	96	96	97	98	98	99	99

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38 C.F.R. § 4.87 (2006) Schedule of ratings – ear.

DISEASES OF THE EAR

	Rating
6200 Chronic suppurative otitis media, mastoiditis, or cholesteatoma (or any combination):	
During suppuration, or with aural polyps	10
Note: Evaluate hearing impairment, and complications such as labyrinthitis, tinnitus, facial nerve paralysis, or bone loss of skull, separately	
6201 Chronic nonsuppurative otitis media with effusion (serous otitis media):	
Rate hearing impairment	
6202 Otosclerosis:	
Rate hearing impairment	
6204 Peripheral vestibular disorders:	
Dizziness and occasional staggering	30
Occasional dizziness	10

Note: Objective findings supporting the diagnosis of vestibular disequilibrium are required before a compensable evaluation can be assigned under this code. Hearing impairment or suppuration shall be separately rated and combined.

6205 Meniere's syndrome (endolymphatic hydrops):	
Hearing impairment with attacks of vertigo and cerebellar gait occurring more than once weekly, with or without tinnitus	100
Hearing impairment with attacks of vertigo and cerebellar gait occurring from one to four times a month, with or without tinnitus	60
Hearing impairment with vertigo less than once a month, with or without tinnitus	30

Note: Evaluate Meniere's syndrome either under these criteria or by separately evaluating vertigo (as a peripheral vestibular disorder), hearing impairment, and tinnitus, whichever method results in a higher overall evaluation. But do not combine an evaluation for hearing impairment, tinnitus, or vertigo with an evaluation under diagnostic code 6205.

6207 Loss of auricle:	
Complete loss of both	50
Complete loss of one	30
Deformity of one, with loss of one-third or more of the substance	10
6208 Malignant neoplasm of the ear (other than skin only)	100

Note: A rating of 100 percent shall continue beyond the cessation of any surgical, radiation treatment, antineoplastic chemotherapy or other therapeutic procedure. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based on that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local recurrence or metastasis, rate on residuals.

6209 Benign neoplasms of the ear (other than skin only):
Rate on impairment of function.

6210 Chronic otitis externa: Swelling, dry and scaly or serous discharge, and itching requiring frequent and prolonged treatment 10

6211 Tympanic membrane, perforation of 0

6260 Tinnitus, recurrent 10

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38 C.F.R. § 4.87 (1999) Schedule of ratings – ear.

DISEASES OF THE EAR

Rating

6200 Chronic suppurative otitis media, mastoiditis, or cholesteatoma (or any combination):
During suppuration, or with aural polyps 10

Note: Evaluate hearing impairment, and complications such as labyrinthitis, tinnitus, facial nerve paralysis, or bone loss of skull, separately

6201 Chronic nonsuppurative otitis media with effusion (serous otitis media):
Rate hearing impairment

6202 Otosclerosis:
Rate hearing impairment

6204 Peripheral vestibular disorders:
Dizziness and occasional staggering 30
Occasional dizziness 10

Note: Objective findings supporting the diagnosis of vestibular disequilibrium are required before a compensable evaluation can be assigned under this code. Hearing impairment or suppuration shall be separately rated and combined.

6205 Meniere's syndrome (endolymphatic hydrops): Hearing impairment with attacks of vertigo and cerebellar gait occurring more than once weekly, with or without tinnitus 100
Hearing impairment with attacks of vertigo and cerebellar gait occurring from one to four times a month, with or without tinnitus 60
Hearing impairment with vertigo less than once a month, with or without tinnitus 30

Note: Evaluate Meniere's syndrome either under these criteria or by separately evaluating vertigo (as a peripheral vestibular disorder), hearing impairment, and tinnitus, whichever method results in a higher overall evaluation. But do not combine an evaluation for hearing impairment, tinnitus, or vertigo with an evaluation under diagnostic code 6205.

6207 Loss of auricle:	
Complete loss of both	50
Complete loss of one	30
Deformity of one, with loss of one-third or more of the substance	10
6208 Malignant neoplasm of the ear (other than skin only)	100

Note: A rating of 100 percent shall continue beyond the cessation of any surgical, radiation treatment, antineoplastic chemotherapy or other therapeutic procedure. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based on that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local recurrence or metastasis, rate on residuals.

6209 Benign neoplasms of the ear (other than skin only):	
Rate on impairment of function.	
6210 Chronic otitis externa:	
Swelling, dry and scaly or serous discharge, and itching requiring frequent and prolonged treatment	10

6211 Tympanic membrane, perforation of	0
6260 Tinnitus, recurrent	10

Note: A separate evaluation for tinnitus may be combined with an evaluation under diagnostic codes 6100, 6200, 6204, or other diagnostic code, except when tinnitus supports an evaluation under one of those diagnostic codes.

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38 C.F.R. § 4.87a (1998) Schedule of ratings – ear.

Diseases of the Ear

	Rating
6200 Otitis media, suppurative, chronic:	
During the continuance of the suppurative process	10
Note: to be combined with ratings for loss of hearing.	
6201 Otitis media, catarrhal, chronic:	
Rate loss of hearing.	
6202 Otosclerosis:	
Rate loss of hearing.	
6203 Otitis interna:	
Rate of loss of hearing.	
6204 Labyrinthitis, chronic:	
Severe; tinnitus, dizziness and occasional staggering	30
Moderate; tinnitus, occasional dizziness	10
Note: To be combined with ratings for loss of hearing or suppuration.	
6205 Meniere's syndrome:	
Severe; with frequent and typical attacks, vertigo, deafness, and cerebellar gait	100
Moderate; with less frequent attacks, including cerebellar gait	60

Mild; with aural vertigo and deafness	30
6206 Mastoiditis:	
Chronic; rate for impairment of hearing and suppuration.	
6207 Auricle:	
Loss of:	
Bilateral	50
Unilateral	30
Deformity of, with loss of one-third or more of the substance	10
6208 New growths, malignant, ear, other than of skin only:	
Rate on impairment of function, plus 10 percent.	
6209 New growths, benign, ear, other than of skin only:	
Rate on impairment of function; minimum	10
6210 Auditory canal, disease of:	
With swelling, dry and scaly or serous discharge, itching, requiring frequent and prolonged treatment	10
6211 Tympanic membrane, perforation of	0
6260 Tinnitus:	10
Persistent as a symptom of head injury, concussion or acoustic trauma	10
(See diagnostic code 8046).	

38 U.S.C. § 1110. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter [38 USCS §§ 1110 et seq.], but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

[SEAL] UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS

CONGRESSIONAL AND LEGISLATIVE AFFAIRS

STATEMENT OF
THE HONORABLE DANIEL L. COOPER
UNDER SECRETARY FOR BENEFITS
DEPARTMENT OF VETERANS AFFAIRS
BEFORE THE
SUBCOMMITTEE ON DISABILITY
ASSISTANCE AND MEMORIAL AFFAIRS
HOUSE COMMITTEE ON VETERANS' AFFAIRS

February 16, 2006

Mr. Chairman and members of the subcommittee, it is my pleasure to be here today to discuss the Department of Veterans Affairs (VA) fiscal year (FY) 2007 budget request for the compensation and pension (C&P) programs.

The Veterans Benefits Administration (VBA) is responsible for administering a wide range of benefits and services for veterans, their families, and their survivors. At the heart of our mission are the disability compensation and pension programs. VBA provides benefits and services to over 3.5 million veterans and other beneficiaries currently receiving compensation and pension benefits, as well as to hundreds of thousands more who apply for VA disability and survivor benefits each year. Our goal is to provide these benefits in a responsive, timely, and compassionate manner in recognition of veterans' service to our Nation.

Since 2000, VBA has experienced an unyielding increase in workload – in claims receipts, claims complexity, and more direct contact with increasing numbers of service members and veterans. Disability claims from

veterans, those returning from war as well as those from earlier periods, increased by 36 percent from 2000 to 2005. This past year alone VA added more than 250,000 new beneficiaries to the disability compensation rolls. Our pending claims inventory has continued to rise since reaching a low of 253,000 in September 2003.

VBA remains absolutely committed to delivering benefits and services to eligible claimants in a timely, accurate, and compassionate manner. The President's 2007 Budget requests nearly $1.2 billion in discretionary budget authority for VBA – a 10.8 percent increase over FY 2006 and over 60 percent more than the FY 2001 budget in effect when the President took office. I plan to direct $1.02 billion of the FY 2007 discretionary funds to the C&P program for staffing resources (9,445 full-time employees (FTE)) and associated expenses as well as program and VBA-wide initiatives ($10 million). The requested level of FTE essential to provide the level of service expected by our Nation for those who have sacrificed so much in defense of our freedom. With a workforce that is sufficiently supported and correctly balanced, VBA can successfully meet the needs of our veterans, while also ensuring stewardship of taxpayer funds.

The table below identifies VBA's workload and FTE projections for FY 2007 based on FY 2005 actuals and FY 2006 projections. A more detailed discussion of the projected workload and FTE requirements follows.

Projected Workload and FTE Requirements	2005	2006 w/Special Outreach	2006 w/o Special Out-reach	2007 w/Special Out-reach	2007 w/o Special Out-reach
VBA Total FTE	12,579	12,931	12,931	13,104	13,104
C&P Direct Labor FTE	7,547	7,911	7,911	7,863	7,863
Projected Increase in Receipts (Over Previous FY)	2%	3% + 12% = 15%	3%	2%	2%
Receipts	788,298	*910,126	811,947	828,186	828,186
Year-end Inventory	346,292	417,852	319,673	396,834	298,655
Output per FTE**	101	106	106	108	108
Production	763,464	838,566	838,566	849,204	849,204
Timeliness (Days)	167	185	165	182	151
Compensation Pending (Days)	122	150	122	141	114

* *Projected 2006 receipts include an additional 98,179 claims projected to be received as a result of specific outreach required by the conference report accompanying the 2006 Appropriations Act.*

** All direct FTE (including clerical, public contact, non-rating claim processors, etc.) are used in the calculation.

VETERANS OF FOREIGN WARS
OF THE UNITED STATES

AFFIDAVIT OF ROBERT E. WALLACE.

Now comes the undersigned, Robert E. Wallace, and certifies the following to be true and correct.

1. My name is Robert E. Wallace, and I am the Executive Director of the Washington, DC office of the Veterans of Foreign Wars of the United States ("VFW"). This affidavit is made in order to provide the Court with information in support of a petition for a writ of certiorari filed by Petitioner Ellis C. Smith.

2. I have been Executive Director for the VFW since February 26, 2001.

3. Based upon my personal knowledge as well as information and belief, the VFW represents approximately 6,000 veterans before the Department of Veterans Affairs, which includes 2,700 currently on appeal at the Board of Veterans' Appeals, and the Court of Appeals for Veterans Claims, each of which presents the issue of whether the claimant/appellant is entitled to separate compensable ratings for service-connected bilateral tinnitus.

4. I hereby certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Robert E. Wallace

Robert E. Wallace
Executive Director
Veterans of Foreign Wars
of the United States
200 Maryland Ave., N.E.
Washington, DC 20002
(202) 608-8361

No. 06-400

In the Supreme Court of the United States

ELLIS C. SMITH, PETITIONER

v.

JIM NICHOLSON,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, upon determining that a Department of Veterans Affairs regulation was ambiguous, correctly deferred to the Department's long-standing interpretation of the regulation.

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In the Supreme Court of the United States

No. 06-400

ELLIS C. SMITH, PETITIONER

v.

JIM NICHOLSON,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 451 F.3d 1344. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 16a-52a) is reported at 19 Vet. App. 63.

JURISDICTION

The judgment of the court of appeals (Pet. App. 53a) was entered on June 19, 2006. The petition for a writ of certiorari was filed on September 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States compensates veterans during peacetime "for disabilit[ies] resulting from personal injury suffered or disease contracted in line of duty." 38

U.S.C. 1131. To that end, Congress has conferred upon the Secretary of Veterans Affairs (Secretary) the authority to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries." 38 U.S.C. 1155. The schedule of ratings essentially dictates whether and to what extent a particular service-connected injury is compensable.

Before 1999, the schedule of ratings, Section 4.87 of Title 38, Code of Federal Regulations, Diagnostic Code (DC) 6260, identified "Tinnitus: Persistent as a symptom of head injury, concussion or acoustic trauma" as a compensable injury. On June 10, 1999, the Secretary amended DC 6260 to identify "Tinnitus: recurrent" as a compensable injury. See 64 Fed. Reg. 25,202 (1999); see also 38 C.F.R. 4.87, DC 6260. Because the regulation does not define "tinnitus" any more specifically, the Department of Veterans Affairs (DVA) has consistently treated tinnitus as a central nervous system disease[1] with a single compensable disability, to wit, a phantom noise perceived in one ear (unilateral tinnitus), in both ears (bilateral tinnitus), or in the head. See, *e.g.*, *Cromley* v. *Brown*, 7 Vet. App. 376, 378 (1995); see also 68 Fed. Reg. 25,822 (2003) (codifying "current standard

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[1] Although the Secretary believes that tinnitus is a central nervous system disease, "[b]ecause over 200,000 veterans are currently rated for tinnitus under diagnostic code 6260 under Diseases of the Ear, for administrative efficiency, and because many are accustomed to looking in that section of the rating schedule, the current placement of tinnitus within the rating schedule will remain unchanged." 68 Fed. Reg. 25,822-25,823 (2003). That interpretation of tinnitus is medically sound. See Vet. Aff. Op. Gen. Couns. Prec. 2-03 at paras. 2-3 (May 22, 2003), available at 2003 WL 24100983 (collecting medical treatises and manuals describing tinnitus as a disorder of the brain, not the inner ear).

VA practice" that "tinnitus is a single disability arising in the brain * * * consist[ing] of the perception of sound in the absence of external stimulus * * * [regardless of] whether the tinnitus is perceived in one ear, both ears, or somewhere undefined in the head"); Pet. App. 13a (court of appeals decision tracing the consistency of DVA's interpretation).

2. Petitioner, served on active duty in the army from March 1966 to March 1969. Pet. App. 2a. Complaining of bilateral tinnitus, petitioner filed for disability compensation in early 1995. *Id.* at 18a. In October 1995 and again in April 1999, a DVA regional office applied the then-current version of DC 6260 and concluded that petitioner's tinnitus was service-connected but was not "persistent." *Id.* at 2a.

The Secretary amended DC 6260 in June 1999, and petitioner thereafter filed a substantive appeal asking the Board of Veterans' Appeals (Board) to re-evaluate his tinnitus under both versions of DC 6260. Pet. App. 19a. So doing, the Board held that (1) petitioner's pre-1999 tinnitus was not compensable because it was not "persistent," and (2) petitioner's post-1999 tinnitus was compensable, but only as a single disability, because it was "recurrent." *Id.* at 3a.

Petitioner appealed the Board's decision to the Court of Appeals for Veterans Claims (Veterans Court), arguing (Pet. App. 19a-20a) that his pre-1999 tinnitus was "persistent" and that, under both versions of DC 6260, bilateral tinnitus should be compensable as two disabilities. In June 2003, the Veterans Court ruled that the Board's application of the pre-1999 DC 6260 was arbitrary and capricious. *Id.* at 20a. Additionally, the Veterans Court vacated the Board's decision that bilateral tinnitus was compensable only as a single disability and

remanded for the Board to consider whether, in light of 38 C.F.R. 4.25(b),[2] bilateral tinnitus is a disease with two separate disabilities. *Ibid.*

The Secretary appealed to the Court of Appeals for the Federal Circuit, which vacated the Veterans Court's decision and remanded for the Veterans Court to consider its jurisdiction. *Smith* v. *Principi*, 108 Fed. Appx. 628 (2004).

3. On remand, the Veterans Court determined that it had jurisdiction over petitioner's appeal. Pet. App. 31a-34a, 37a-38a. Reaching the merits, the court again rejected the Board's application of the pre-1999 DC 6260 and remanded for the Board to produce an adequate statement of reasons. *Id.* at 34a-37a.

Turning to the question whether, under both versions of DC 6260, bilateral tinnitus is a disease with two separate disabilities, the Veterans Court held that DVA's determination that tinnitus was a disease with a single disability "conflict[ed] with the plain meaning of the regulation." Pet. App 39a. The court observed that DC 6260 lists tinnitus under the heading "disease of the ear." *Id.* at 41a. Because 38 C.F.R. 4.25(b) requires compensation for each disability "arising from a single disease entity," the court concluded that DVA must compensate petitioner "for each ear affected by a single case of tinnitus." Pet. App. 40a-41a. In dictum the court

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[2] Section 4.25(b) of Title 38, Code of Federal Regulations, provides in pertinent part:

> Except as otherwise provided in this schedule, the disabilities arising from a single disease entity, e.g., arthritis, multiple sclerosis, cerebrovascular accident, etc., are to be rated separately as are all other disabling conditions, if any.

noted that, "even if the regulations in this case were ambiguous, the Court would find the argument that [the Secretary's interpretation] embodied either a 'standard VA practice' or an established agency policy based on a 'common medical definition' to be unpersuasive." *Id.* at 45a; see *id.* at 41a ("Assuming, arguendo, that the regulation's language was not plain, the Court does not agree with the Secretary's contention that an examination of other DCs shows an intent of the drafters to exclude dual ratings unless the DC expressly provides for such dual rating.").

4. The Federal Circuit reversed. Pet. App. 1a-15a. First, the court held that DC 6260 and 38 C.F.R. 4.25(b) "leave[] 'in doubt' whether tinnitus in each ear constitutes separate disabilities." Pet. App. 11a. The court reasoned that "while tinnitus is listed under the heading '*diseases* of the ear,' DC 6260 does not address whether tinnitus, as perceived in one ear, two ears, or otherwise, is a single *disability*." *Id.* at 11a-12a (emphases added). The court found that the Veterans Court erroneously and without support assumed "that tinnitus in one ear constitutes one disability[] and that tinnitus in two ears constitutes two disabilities." *Id.* at 12a. The regulations, the court of appeals held, do not compel that assumption, which "DVA has reasonably rejected as not supported by the text of the regulations." *Ibid.* Because the regulations are silent as to whether bilateral tinnitus is a disease with one or two disabilities, the court observed that "deference must be afforded to the DVA's interpretation as long as that interpretation is not 'plainly erroneous or inconsistent with the regulations.'" *Ibid.* The court found "a lack of evidence in the record that the DVA's interpretation is plainly erroneous," and concluded that the DVA's interpretation is

"not inconsistent with the regulations." *Id.* at 13a. Finding also that DVA's treatment of bilateral tinnitus had been consistent over time and revealed in public documents,[3] the court of appeals concluded—contrary to the dictum in the Veterans Court's opinion—that DVA's interpretation deserved deference. *Id.* at 14a.

ARGUMENT

The two arguments that petitioner raises in his petition are waived because they were not presented to the court of appeals. In any event, petitioner's arguments are also wholly unsupported and contrary to sound precedent. For those reasons and because the court of appeals' correct decision does not conflict with any decision of this Court or any other court of appeals, this Court's review is unwarranted.

1.a. Petitioner contends (Pet. 5) that the court of appeals "fail[ed] to defer to the Veterans Court interpretation of VA regulations." Petitioner, however, never argued below that the court of appeals should defer to the Veterans Court's determination that the regulations required DVA to treat bilateral tinnitus as two disabilities; rather, petitioner argued only that the regulations clearly compel that conclusion. See Pet. C.A. Br. 2-5. By not raising the deference argument below, petitioner has waived it before this Court, and certiorari should be denied. See *Illinois* v. *Gates*, 459 U.S. 1028, 1029 (1982) (observing that "it is generally undesirable" to permit a party to seek reversal of a lower court judgment on a

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[3] "[M]ore importantly," stated the court, "even if the DVA's interpretation were not reflected in published documents and was only reflected in litigating documents, that would still not be a basis for declining to defer to the agency's interpretation of its own regulation." Pet. App. 14a.

ground not considered by that court); *Tennessee* v. *Dunlap*, 426 U.S. 312, 316 n.3 (1976) (new arguments or claims not raised below are not properly before the Court).

b. Even if petitioner's deference argument were not waived, petitioner would clearly be wrong in contending that the court of appeals had "to defer to the Veterans Court interpretation of VA regulations." Pet. 5.

This Court's decisions have made clear that federal courts are to defer to "*an agency's* interpretation of *its own* regulation." *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) (emphases added) (discussing *Auer* v. *Robbins*, 519 U.S. 452 (1997)); see *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Petitioner recognizes (Pet. 7) and builds his deference argument upon that principle, reasoning that deference is warranted because the Veterans Court has "final Executive Branch authority" to interpret DVA regulations, such that it is the de facto agency head (Pet. 12). In support of that position, petitioner argues (Pet. 8-10) that the Veterans Court is "expert" and "within the Executive Branch." Those arguments are meritless, however, because they rely on a misunderstanding of the jurisdiction and design of the Veterans Court.

The Secretary of Veterans Affairs is the authoritative interpreter of DVA regulations. Congress delegated to the Secretary—not to the Veterans Court—the authority to promulgate regulations to carry out the statute's requirements. 38 U.S.C. 501; see 38 U.S.C. 1155 (giving the Secretary authority to "adopt and apply" the regulations involved in this case). Bypassing the Veterans Court, Congress has made actions of the Secretary in promulgating regulations generally subject to judicial

review in the Federal Circuit. 38 U.S.C. 502. The Veterans Court, in fact, can pass upon regulations and DVA's interpretations of them only "when presented" in an appeal from the Board. 38 U.S.C. 7261(a). It would be peculiar, if the Veterans Court were the authoritative voice for interpreting DVA regulations, for Congress to have created only that one narrow channel by which a DVA regulation could be considered before the Veterans Court. Section 7252, moreover, prevents the Veterans Court from reviewing the schedule of ratings for disabilities, which is an integral part of the VA regulations involved in cases brought before the Veterans Court; if the Veterans Court were the true "head" of DVA, Congress would not have so limited its review functions.

Petitioner argues (Pet. 8-10) that the Veterans Court's interpretations of the Secretary's regulations are entitled to deference because the court is expert and located within the Executive Branch. Assuming *arguendo* that petitioner has properly characterized the Veterans Court as an executive agency, his argument runs aground on *Martin* v. *OSHRC*, 499 U.S. 144 (1991). The question in *Martin* was whether a reviewing court considering an ambiguous regulation should defer to the Secretary of Labor or to the Occupational Safety and Health Review Commission when Congress had split rulemaking and adjudication authority between them. *Id.* at 151. Looking to congressional intent as expressed in the statutory scheme, *id.* at 152, the Court held that the Secretary deserves deference because "the power to render authoritative interpretations" of the Secretary's regulations is "a necessary adjunct of the Secretary's powers to promulgate" those regulations. *Ibid.* (internal punctuation omitted); see *ibid.* ("Because the Secretary promulgates these stand- -ds, the Secretary is in a

better position than is the Commission to reconstruct the purpose of the regulations in question."). The Secretary of Veterans Affairs, like the Secretary of Labor in *Martin*, has exclusive rulemaking authority and has promulgated the regulations at issue in this case; the Veterans Court, like the Commission in *Martin*, is purely adjudicative. Presumptively, reviewing courts therefore should defer to the Secretary; and the Veterans Court's limited ability to consider the Secretary's regulations indicates that Congress did not choose to deviate from that presumption here. See *id.* at 157-158 (noting that Congress "is free" to pair adjudication with deference).

Insofar as the Veterans Court is viewed as an Article I legislative court *outside* the Executive Branch, there is no disagreement in the courts of appeals or in this Court that a federal court reviewing the judgment of an Article I court defers to an agency's interpretation of its own regulation, not to the Article I court's interpretation. See, *e.g.*, *American Express Co.* v. *United States*, 262 F.3d 1376, 1382 (Fed. Cir. 2001) (deferring to IRS when reviewing Court of Federal Claims); *Kurzet* v. *CIR*, 222 F.3d 830, 844-845 (10th Cir. 2000) (deferring to IRS when reviewing Tax Court). Further review is not warranted.

2. Petitioner's alternative contention[4] that ambiguities in DVA regulations must be resolved in favor of veterans is also wholly unsupported, contrary to precedent, and does not warrant further review. Petitioner relies upon the "Fishgold Rule," the canon of construction that statutory provisions benefitting members of the armed services are to be construed in the beneficia-

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[4] Petitioner did not raise his alternative argument in the court of appeals, and it is therefore waived.

ries' favor. Pet. 15 (citing *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991) and *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). That canon applies only to the intepretation of statutes, however, not to regulations, and the reasons for the canon's application are at their weakest when, as here, Congress has expressly given the Secretary flexible policymaking discretion to adopt and apply a schedule for veterans disability compensation.

Moreover, even if the canon were applicable in the regulatory context, it could not override the Secretary's reasonable construction of his own regulation. The rule of lenity, for example, "is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act,' such that even after a court has seize[d] everything from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (citations and internal punctuation omitted). By analogy, the canon cited by petitioner could have no application unless an ambiguity persisted even after consideration of "everything from which aid can be derived"—a category of interpretive aids that would assuredly include fundamental principles of administrative deference. The court of appeals was thus correct in concluding that the "pro-claimant nature of the veteran [benefits] adjudication system" does not prevent courts from deferring to the Secretary's policy decisions. *Gallegos* v. *Principi*, 283 F.3d 1309, 1314 (Fed. Cir.), cert. denied, 537 U.S. 1071 (2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-400

IN THE

Supreme Court of the United States

ELLIS C. SMITH,

Petitioner,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERAN AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit properly deferred to the Department of Veterans Affairs' own interpretation of an ambiguous regulation instead of determining under 38 U.S.C. § 7292(d)(1) whether an alternative interpretation of that regulation "that was relied upon in the decision of the Court of Appeals for Veterans Claims" was "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law"?

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STATEMENT OF INTEREST[1]

The Veterans of Foreign Wars of the United States (VFW) is a federally chartered voluntary membership corporation with a total membership of nearly 1.9 million veterans, most of whom are also members of local Posts, which are themselves membership corporations or unincorporated associations. The VFW was founded in 1899. One of its fundamental purposes, as expressed in its Congressional Charter, 36 U.S.C. § 230102, is "to assist worthy comrades; to perpetuate the memory and history of our dead; and to assist their widows and orphans." Fulfilling that promise and purpose, the VFW and its members are actively engaged in protecting the rights of America's veterans and assuring that they receive the care and recompense they deserve for their service to the Country in defense of our freedoms.

As part of its mission, the VFW helps veterans and their families apply for disability compensation, rehabilitation and education programs, pension and death benefits, employment and training programs, and many other programs before the Department of Veterans Affairs ("VA"). VFW service officers function as attorneys-in-fact for the veterans and families they represent. The service officers guide veterans and their families through the rating boards and appeals process and, when needed, assist in presentations before the VA and the Board of Veterans' Appeals ("BVA").

The VFW is actively assisting veterans who, like the Petitioner here, suffer from tinnitus in both ears and whose benefits claims for a dual-disability rating will be affected by the outcome of Petitioner's case. The VFW estimates that it is assisting in approximately 2,700 such tinnitus cases that

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[1] Counsel for both parties have consented to the filing of this brief, and the parties' letters of consent have been filed with the Clerk of Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the members of *amicus curiae* and its counsel, contributed monetarily to the preparation or submission of this brief.

have reached the BVA and another 4,000 cases under consideration in VA field offices. The VA held those cases in abeyance, pending the decision in Petitioner's case by the Court of Appeals for the Federal Circuit ("Federal Circuit"). Following the adverse ruling by the Federal Circuit, the VA activated the cases and began denying the dual-disability ratings claims. The VFW has assisted nearly 800 such veterans in appealing to the United States Court of Appeals for Veterans Claims ("Veterans Court"), where the cases are being stayed, pending the outcome of the petition for writ of *certiorari* in this case.

In reversing the Veterans Court's decision in favor of Petitioner, the Federal Circuit failed to review the Veterans Court's decision under the deferential arbitrary and capricious type review standard required by statute and intended by Congress. Instead, the Federal Circuit improperly reviewed the case *de novo* and wrongly deferred to the VA's regulatory interpretation. In doing so, the Federal Circuit mistakenly followed precedent by this Court that does not apply here in view of the statutory review standard enacted by Congress in 38 U.S.C. § 7292(d)(1). Correcting that error in this case will beneficially affect the thousands of veterans who are receiving the VFW's assistance with their tinnitus-related benefits claims before the VA. It will also clarify the roles of the Veterans Court and the Federal Circuit in their review of appeals from VA benefits decisions, better enabling the VFW in its mission to advise and assist veterans and their families with their VA benefits claims.

STATEMENT OF THE CASE

The VFW adopts the Statement of the Case presented by Petitioner. Pet. at 2-5. Petitioner is a veteran of honorable service who seeks a dual disability rating for service-related tinnitus suffered in each ear.

In reversing the Veterans Court's regulatory interpretations in favor of petitioner's dual disability claim, the Federal Circuit concluded that under 38 U.S.C. § 7292, it may "review interpretation of regulations by the Veterans

Court *de novo* and may set aside any regulation or interpretation of the regulation that we find to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or without observation of a procedure required by law." (Petitioner's Appendix A5a-A6a).

As a result of its *de novo* review, the Federal Circuit ruled that "[b]ecause the regulations here leave in doubt whether tinnitus in each ear can be a separate disability, they are ambiguous, and the [VA] was entitled to apply its own construction to the ambiguous regulations." (A12a). Nowhere, however, did the Federal Circuit find that the Veterans Court's alternative regulatory interpretation favoring petitioner was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law to justify setting aside the regulatory interpretation "that was relied upon in the decision of the Veterans Court," as required by 38 U.S.C. § 7292.

REASONS FOR GRANTING THE PETITION

I. Guidance Is Needed on the Proper Standard of Federal Circuit Review

This case presents a legal dispute that is classically appropriate for resolution by this Court under the considerations identified in Sup. Ct. R. 10. First, various panels of the Federal Circuit have stated conflicting standards for reviewing interpretations of VA regulations. Second, the question presented is purely legal in nature and controlled by statutory provisions that govern the Federal Circuit's jurisdiction over VA benefits cases and the Federal Circuit's scope of review. Third, the Federal Circuit's stated *de novo* review standard of the Veterans Court's regulatory interpretations and deference to a conflicting VA interpretation substantially departs from the limited scope of review intended by Congress and the scope of review permitted by statute. Finally, the resolution of this dispute will personally impact thousands of veterans who will be

denied benefits as a result of the Federal Circuit's erroneous decision.

A. The Federal Circuit is Limited to an Arbitrary and Capricious Type Standard of Review

The Federal Circuit's jurisdiction over appeals from the Veterans Court is provided in 38 U.S.C. § 7292. Section 7292(a) provides, in relevant part:

> After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule law or of any statute or regulation ... or *any interpretation thereof ... that was relied on by the Court* in making the decision.

(Emphasis added.)

The scope of the Federal Circuit's review of the Veterans Court's decisions is governed by 38 U.S.C. § 7292(d)(1), which provides in relevant part:

> The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or *any interpretation thereof ... that was relied upon in the decision* of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of the statutory right; or
>
> (D) without observance of procedure required by law.

(Emphasis added.)

Thus, 38 U.S.C. § 7292 expressly delineates the specific findings that the Federal Circuit must make before it may

permissibly set aside *any* regulatory interpretation *relied upon in the decision* of the Veterans Court. Consequently, the Federal Circuit may not set aside the Veterans Court's regulatory interpretation unless it finds that the interpretation was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; etc. 38 U.S.C. § 7292(d)(1). This is true even if the regulatory interpretation relied on in the Veterans Court's decision conflicts with the VA's own interpretation of the same regulation. Thus when presented with conflicting interpretations, the Federal Circuit is not permitted to preferentially defer to the VA's interpretation, even if it is a reasonable one. It can only give effect to the VA's interpretation if it finds that the Veterans Court's alternative interpretation is arbitrary, capricious, an abuse of discretion, or otherwise in conflict with law.

B. The Federal Circuit Disregarded the Statutorily Prescribed Review Standard

Here, the Federal Circuit improperly set aside the Veterans Court's interpretation without making any of the prerequisite findings under 38 U.S.C. § 7292(d)(1). Instead, the Federal Circuit mechanically deferred to the VA's own regulatory interpretation after concluding that the regulation was "ambiguous" and that the VA's interpretation was not "plainly erroneous." (*See* A12a-A13a.) In doing so, the Federal Circuit said that it was following this Court's previous rulings "that an agency's interpretation of its own regulations is entitled to substantial deference by the courts." (A10a (citing *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001); *Auer v. Robbins*, 519 U.S. 452 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991); *Udall v. Tallman*, 380 U.S. 1 (1965)).)

Those prior decisions cited by the Federal Circuit, however, are distinguishable and do not control the issues presented here. First, resolution of those cases did not depend upon the construction of 38 U.S.C. § 7292, or similar statute, that precisely defines the scope of judicial review.

Second, the prior decisions addressed judicial review of regulatory interpretations of non-VA agencies that did not involve conflicting interpretations of a specialty Court, such as the Veterans Court. Finally, as discussed further below, Congress created a unique structure for the appeal and review of VA benefits claims that intentionally and substantially limits the scope of the Federal Circuit's review of the Veterans Court's decisions.

Although not controlling, this Court's ruling in *Martin* bears the closest resemblance to this case and is instructive. At issue was whether courts should defer to the Secretary of Labor when both the Secretary of Labor and the Occupational Safety and Health Review Commission ("the Commission") each propose reasonable but conflicting regulatory interpretations. *Martin*, 499 U.S. at 146. Similar to the divided roles between the VA and the Veterans Court, the Occupational Safety and Health Act assigned distinct regulatory responsibilities to the Secretary and the Commission, a three-member board appointed by the President. To the Secretary was assigned responsibility "for setting and enforcing workplace health and safety standards" and to the Commission was assigned an adjudicatory role to review the Secretary's citations and proposed penalties. *Id.* at 147-48. Further framing the issue presented, the Court sought to determine "to which administrative actor -- the Secretary or the Commission -- did Congress delegate ... 'interpretive' lawmaking power[.]" *Id.* at 151. Because the relevant statutes did "not expressly address the issue," the Court had to draw inferences from the structure and history of the statutes to determine which administrative actor had been delegated "the power to render authoritative interpretations[.]" *Id.* at 152.

The Court presumed that Congress "intended to invest interpretive power in the administrative actor in the best position to develop" expertise in the regulatory field and concluded that the Secretary was in a better position than the Commission to develop historical familiarity and policymaking expertise relevant to a particular regulatory interpretation. *Id.* at 153-54. Moreover, the Court reasoned

that "the more plausible inference is that Congress intended to delegate to the Commission the type of non-policymaking adjudicatory powers typically exercised by a *court*" whereby "the Commission is authorized to review the Secretary's interpretations only for consistency with regulatory language and for reasonableness." *Id.* at 154-55 (emphasis in original).

The Court's *Martin* decision is, however, expressly limited to its facts. *Id.* at 157-58. The Court said, "Subject only to constitutional limits, Congress is free, of course, to divide these powers as it chooses, and we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure." *Id.* at 158. Thus, although *Martin* may suggest a presumption that an adjudicatory body, such as the Veterans Court, does not exercise interpretive lawmaking power, it nevertheless acknowledges that "Congress is free, of course," to delegate those powers "as it chooses." *Id.*

C. Congress Empowered the Veterans Court to Make Authoritative Regulatory Interpretations

The statutory structure presented here demonstrates that Congress made such a delegation of authority to the Veterans Court, giving it a limited role in making authoritative interpretations of VA regulations. The Veterans Court's authority is provided in 38 U.S.C. § 7261, which provides, in relevant part:

> (a) In any action brought under this chapter [38 U.S.C. §§ 7251 et seq.], the [Veterans Court], *to the extent necessary to its decision* and when presented, shall
>
> (1) decide all relevant questions of law, *interpret* constitutional, statutory, and *regulatory provisions*, and determine the meaning or applicability of the terms of an action of the Secretary;
>
> ....
>
> (3) hold unlawful and set aside decisions, findings..., conclusions, rules, and *regulations* issued

> or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of the statutory right; or
>
> (D) without observance of procedure required by law.

(Emphasis added.)

Under 38 U.S.C. § 7261(a)(1), the Veterans Court has authority to "interpret ... regulatory provisions." That interpretive authority may be exercised "to the extent necessary to" the Veterans Court's decision.

Comparing 38 U.S.C. § 7292, governing the Federal Circuit's scope of review, with 38 U.S.C. § 7261, governing the Veterans Court's scope of review, further underscores Congress's intention to give the Veterans Court interpretive authority. Section 7261(a)(3) requires the Veterans Court to use a deferential standard when reviewing the validity of VA *regulations*, setting VA regulations aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; etc.[2] Conspicuously absent from the review standard in 38 U.S.C. § 7261(a)(3) is any mention of the Veterans Court's review of the VA's *regulatory interpretations*.

In contrast, 38 U.S.C. § 7292(d)(1), which was enacted at the same time as 38 U.S.C. § 7261, expressly requires the

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[2] This deferential standard for reviewing the validity of VA *regulations* comports with this Court's ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, that a reviewing court must defer to an agency's statutory constructions embodied in promulgated regulations, unless the regulations "are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. 837, 843-44 (1984).

Federal Circuit to apply the same deferential standard when reviewing a *regulation* or "*any interpretation thereof*" by the Veterans Court. Not only were 38 U.S.C. §§ 7261 and 7292 enacted as part of the same legislation, they also bear close structural resemblance to each other, insofar as describing the scope of each court's review. However, the "any interpretation thereof" clause was not included in 38 U.S.C. § 7261. Congress obviously could have used that or similar language to expressly require the Veterans Court to review the VA's regulatory interpretations under the deferential arbitrary and capricious standard, but it did not.

As a result, there is no express statutory requirement that the Veterans Court defer to the VA's interpretations to resolve regulatory ambiguity. Moreover, inferring such a deferential standard of review is not appropriate. The express language of 38 U.S.C. § 7292(d)(1) confirms that Congress intended to authorize the Veterans Court to make authoritative interpretations of VA regulations that cannot be disturbed by the Federal Circuit, unless the Veterans Court's interpretations are arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, etc. Requiring the Veterans Court to defer to the VA's interpretations of ambiguous regulations would impermissibly prevent the Veterans Court from exercising that interpretive authority given by Congress.

Section 7292 therefore makes clear that the Veterans Court need not reflexively defer to the VA. Instead, the Veterans Court may rely upon *any* regulatory interpretation in its decisions that is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law—even if that interpretation is inconsistent with a reasonable VA regulatory interpretation. This does not mean that the VA's regulatory interpretations are accorded no deference. It means only that the VA's regulatory interpretations are not controlling. Where agency interpretations are not controlling, this Court has held that they, nevertheless, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). In practice,

therefore, the Federal Circuit's determination of whether the Veterans Court's regulatory interpretations are arbitrary, capricious, or an abuse of discretion may be guided, but not controlled, by the VA's own regulatory interpretations. *Accord General Electric Co. v. Gilbert*, 429 U.S. 125, 141-46 (1976) (EEOC guideline not controlling and evaluated against backdrop of earlier conflicting agency pronouncements). However, interpretive conflicts between the Veterans Court and the VA are not automatically resolved in the VA's favor. Section 7292 expressly requires the Federal Circuit to accord the Veterans Court's reasonable regulatory interpretations substantial deference.

This review standard is not necessarily at odds with the rationale of this Court's prior rulings that an agency's reasonable regulatory interpretations are given controlling weight because the agencies are presumably better equipped than courts to make sound policy judgments. *See, e.g., Martin*, 499 U.S. at 153-54. Here, Congress has not left the interpretation of VA regulations to inexperienced courts. To the contrary, Congress created a specialty court in 1988, the Veterans Court, that would develop expertise in the regulatory field through the adjudication of benefits claims. Therefore, when the Veterans Court relies in its decision upon a regulatory interpretation that is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, the Federal Circuit must defer to that interpretation, even if it conflicts with VA General Counsel opinions, manual provisions, or other interpretive statements.

II. Granting the Petition is Needed to Effectuate the Scope of Judicial Review Intended by Congress

A. Congress Intended to Significantly Limit the Scope of Federal Circuit Review

Prior to the Veterans' Judicial Review Act of 1988 ("the Act"), judicial review of VA benefits decisions was, with few exceptions, prohibited by "no-review" statutes, dating back to as early as 1933. *See generally Johnson v. Robison*, 415 U.S. 361, 368-69 (1974). The no-review statutes had two purposes: (1) to avoid burdening the courts with

veterans' benefits claims and the VA with litigation expense and (2) to insure uniformity in the application of VA policy to benefits claims. *Id.* at 370. There was great reluctance to "involve the courts in day-to-day determination and interpretation of Veterans' Administration policy." *Id.* at 372. There was also the practical concern that due to the courts' heavy criminal and other priority caseloads, judicial review would inevitably delay processing veterans' benefits claims. H.R. Rep. 100-963, 1988 U.S.C.C.A.N. 5782, 5830. The House Committee on Veterans' Affairs reported finding "from the testimony before the committee that judges do not wish to take on the very technical and specialized task of applying a well established body of law governing the adjudication of veterans' claims to thousands of factual disagreements which arise between the VA and claimants." *Id.* at 5806.

To achieve the objectives of efficiency and uniformity, Congress created the Veterans Court, with exclusive jurisdiction over appeals from VA benefits determinations. Moreover, Congress gave the Federal Circuit, rather than the regional courts of appeals, exclusive jurisdiction over appeals from the Veterans Court. *See id.* at 5810. Yet, the Federal Circuit's role in reviewing the Veterans Court's decisions was, from the beginning, intended to be a limited one.

Senator Alan Cranston memorialized the compromise between the Senate and the House of Representatives that led to the approval of the Act. The compromise related, in significant part, to the intended scope of the Federal Circuit's review of veterans' benefits claims. According to Senator Cranston:

> [U]nder this compromise, there is one more level of review. The validity of laws and regulations can be challenged in the [Federal Circuit].... If a veteran believes that a law or regulation is invalid on its face and if that law or regulation was germane to his claim, then the veteran can ask the Federal Circuit to rule on the validity of that law or regulation.

> The Federal Circuit cannot, ... review any factual questions in the veteran's appeal. The Federal Circuit cannot review whether, ... a law or regulation was applied inappropriately. *The key to the compromise,-* and *I cannot overemphasize this point-* is the limited nature of the Federal Circuit's jurisdiction.
> The compromise *does not envision the Federal Circuit as having general oversight of the [Veterans Court].* The compromise permits the Federal Circuit to review questions involving the validity of statutes and regulations as if it were reviewing them under a challenge to rulemaking. And that's it, ... that's it.

134 CONG. REC. S16632-01 (Oct. 18, 1988) (statement by Sen. Cranston) (emphasis added).

Thus, Congress intended that the Federal Circuit would play a very limited role in reviewing veterans' benefits claims. The deferential arbitrary and capricious standard of review provided in 38 U.S.C. § 7292(d)(1) reflects that limited review function intended by Congress. It does not burden the Federal Circuit with "general oversight" of the Veterans Court or require it to undertake a *de novo* review of the Veterans Court's regulatory interpretations, as the Federal Circuit did in this case. Rather, Congress rejects *de novo* review by the Federal Circuit in favor of the more limited arbitrary and capricious type review prescribed by 38 U.S.C. § 7292(d)(1).

B. Congress Intended the Veterans Court to Make Independent Regulatory Interpretations

The legislative history demonstrates that Congress intended to give the Veterans Court significant independence from the VA in interpreting regulations. For example, the House Committee on Veterans' Affairs reported that "[t]he creation of a court is intended to provide a more independent review by a body which is not bound by the Administrator's view of the law, and that will be more clearly perceived as one which has as its sole function deciding claims in accordance with the Constitution and the laws of the United States." H.R. Rep. 100-963, 1988 U.S.C.C.A.N. 5782, 5808.

The committee also expressed its views on the level of deference that the Veterans Court would be required to give the VA, stating, "As is presently the case in matters appealed to the [BVA], the Court *would not be required to give any deference* to the decision of the Administrator, and may substitute its judgment for the judgment of the VA decision-maker." *Id.* at 5788 (emphasis added).

The VA itself anticipated that Congress would create a governmental body with power to review and potentially invalidate its regulations. Although opposed to judicial review of its benefits decisions, the VA recommended that if such a review body was created, it should not be part of the VA's organization. The VA's General Counsel, Donald Ivers, testified before the House Committee,

> The VA is strongly opposed to legislative proposals that would authorize the [BVA], or any other element of the Agency, to invalidate its regulations and other precedential interpretations of the law. It is essential that the agency employ a coherent and consistent interpretation of the law. In the event the Board is permitted to second-guess or disregard the regulations and their interpretation, the law applied to claims may vary depending upon the stage of adjudication; i.e., rating boards may apply different standards than the [BVA].... In any case, reformulation of section 211(a), as noted earlier, would ensure veterans a day in court to challenge VA regulations, and thus provide for an independent review without the divisiveness or chaos that would be engendered by empowering one element of the Agency to abrogate VA regulations and other governing interpretations of law.

Id. at 5832-33.

Congress did create such an independent review body, the Veterans Court, outside of the VA organization. During Congress's deliberations, Senator Alan Cranston explained the anticipated division of labor between the VA and the Veterans Court with respect to fact-finding and the interpretation of statutes and regulations:

> The idea, Mr. President, is that the VA and [BVA] are recognized as the premier factfinders. Indeed, this is absolutely consistent with every other judicial review bill which has been considered in either body. With respect to factual determinations, then, the purpose of the Court of Veterans Appeals is to provide a last 'check' on [the BVA] to ensure that a particular veterans' case, for whatever reason, isn't getting short shrift. *On the other hand*, we expect a court to entertain and *decide full-blown challenges to the validity of the laws and regulations*. That, too, has been a feature of every other judicial review bill. And that's exactly the authority the compromise amendment would grant to the Court of Veterans Appeals.

134 CONG. REC. S16632-01 (Oct. 18, 1988) (statement by Sen. Cranston) (emphasis added).

Accordingly, the legislative history shows that Congress intended the Veterans Court to play a limited fact-finding role. In contrast, however, Congress fully intended to empower the Veterans Court to "decide full-blown challenges to the validity of the laws and regulations," including making authoritative regulatory interpretations. The legislative history likewise shows that Congress intended that the Veterans Court would exercise that authority independent of the VA and that the Veterans Court may give VA regulatory interpretations minimal deference in reaching its independent decisions.

III. Granting the Petition Is Needed to Resolve Conflicts Among Federal Circuit Panels

A. The Conflict Among Federal Circuit Panels

One of the considerations governing review on *certiorari* under Sup. Ct. R. 10 is whether one United States court of appeals has entered a decision that conflicts with a decision of another United States court of appeals. That specific conflict cannot arise in the context of appeals from the Veterans Court, because the Federal Circuit has exclusive jurisdiction over all such appeals. *See* 38 U.S.C. § 7292(c).

Nevertheless, that *type* of conflict has arisen over time among various panels of the Federal Circuit, which have not consistently construed the review standard of 38 U.S.C. § 7292.

Shortly after the Veterans Court was created, one panel of the Federal Circuit addressed the language that now appears in 38 U.S.C. § 7292(d)(1) (then codified as 38 U.S.C. § 4092(d)(1)):

> According to the first sentence of § 4092(d)(1), this Court may review the Veterans Court's legal determinations under a *de novo* standard. The second sentence of § 4092(d)(1) authorizes this court to set aside any regulations or regulatory interpretations of the Veterans Court which are unconstitutional, violative of statute, procedurally defective, or otherwise arbitrary.

Prenzler v. Derwinski, 928 F.2d 392, 393 (Fed. Cir. 1991); *accord Santana-Venegas v. Principi*, 314 F.3d 1293, 1296 (Fed. Cir. 2002) (Veterans Court's regulatory interpretations subject to arbitrary and capricious type review); *Herndon v. Pincipi*, 311 F.3d 1121, 1124 (Fed. Cir. 2002) (same); *Smith v. Pincipi*, 281 F.3d 1384, 1386 (Fed. Cir. 2002) (same).

In direct conflict with *Prenzler* and the plain language of 38 U.S.C. § 7292(d)(1), the Federal Circuit has elsewhere stated that the Veterans Court's regulatory interpretations are entitled to *no* deference. For example, in *Bingham v. Nicholson*, the Federal Circuit said, "[W]e may review the validity of 'a rule of law or of any statute or regulation ... or any interpretation thereof ... that was relied on by the [Veterans] Court in making the decision.' ... Such legal determinations of the Veterans Court are reviewed without deference." 421 F.3d 1346, 1348 (Fed. Cir. 2005) (citing *Prenzler*, 928 F.2d at 393); *accord Jensen v. Brown*, 19 F.3d 1413, 1415 (Fed. Cir. 1994) ("[I]nterpretation of a statute or regulation is a question of law which we review *de novo*") (citing *Prenzler*, 928 F.2d at 393); *Nolen v. Gober*, 222 F.3d 1356, 1359 (Fed. Cir. 2000) ("We review independently the Court of Appeals for Veterans Claims' interpretations of statutory provisions and regulations.").

The Federal Circuit has, therefore, stated conflicting standards for its review of regulatory interpretations by the Veterans Court. Those conflicting standards are materially different and will lead to substantively different outcomes in veterans benefits appeals to the Federal Circuit, unless the conflicts are resolved.

B. This Court Has Granted Certiorari to Resolve Similar Conflicts

The issues presented in the petition are similar and of equal importance to issues previously addressed by this Court in other contexts. For example, *certiorari* was granted to resolve conflicts among the Courts of Appeal as to whether denials of benefits under the Employee Retirement Income Security Act ("ERISA") by plan administrators should be reviewed under a *de novo* or arbitrary and capricious standard of review. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989). At issue in that case was the level of deference that should be given to interpretations by ERISA plan administrators. *Id.* at 108-114. The petition here presents similar motivations for this Court to state the proper standard of appellate review. *Accord Dickinson v. Zurko*, 527 U.S. 150 (1999) (the Court granted *certiorari* to consider whether the Federal Circuit reviews U.S. Patent & Trademark Office decisions under an "arbitrary and capricious" review standard or a "substantial evidence" review standard).

Likewise, the Court granted *certiorari* in *Martin v. Occupational Safety and Health Review Commission*, to resolve conflicts between the Secretary of Labor and the Occupational Safety and Health Review Commission as to which agency actor could exercise authoritative interpretive power in construing agency regulations. 499 U.S. 144 (1991). The Court noted in that decision that "[t]his is not the first time that we have been called upon to resolve an OSH Act 'jurisdictional' dispute between the Secretary and the Commission." *Id.* at 152 (citing *Cuyahoga Valley R. Co. v. United Transportation Union*, 474 U.S. 3 (1985)). The petition here presents similar jurisdictional issues—whether

the VA's regulatory interpretations are entitled to judicial deference over alternative interpretations by the Veterans Court that are not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

IV. The Federal Circuit Improperly Disregarded the Veterans Court's Regulatory Interpretation

Although the Federal Circuit expressed its disagreement with the Veterans Court's interpretation of the VA regulation, it failed to make the prerequisite findings under 38 U.S.C. § 7292(d)(1) to justify setting aside that interpretation in favor of the VA's interpretation. The Federal Circuit's failure to review the Veterans Court's regulatory interpretation under the prescribed statutory standard was not harmless, because applying the correct standard of review would lead to a different outcome.

A. The Veterans Court's Regulatory Interpretation Was Not Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

The principal fault that the Federal Circuit found with the Veterans Court's analysis was the alleged *presumption* "that tinnitus in one ear constitutes one disability, and that tinnitus in two ears constitutes two disabilities." (A12a.) However, the Veterans Court did not merely presume that bilateral tinnitus constitutes two disabilities. It arrived at the conclusion after extensively analyzing the VA's regulatory scheme as a whole and drawing rational conclusions from that analysis.

For example, the Veterans Court found that for similar conditions, the impairment of auricles, the VA's rating schedule for "Diseases of the Ear" expressly provided a higher rating for the loss of two auricles than for a loss of only one. (A42a-A43a.) In the context of disorders of the ears, the VA had treated bilateral defects as "two disabilities." Thus, the Veterans Court's analysis did not hang on a mere presumption that bilateral defects of the ear are separate disabilities, as suggested by the Federal Circuit, but was grounded in the VA's own regulatory practice.

Furthermore, the Veterans Court acknowledged that the VA's rating schedule was silent as to whether an enhanced rating is applied for tinnitus in both ears. (A41a.) In view of that silence, the VA asserted that "the drafters of the schedule meant to preclude a dual rating for the other ear diseases in that section, including tinnitus." (A42a.) The Veterans Court disagreed and returned to the example of the treatment of disabled auricles under the ratings schedule. The Veterans Court found that the enhancement provided for the loss of two auricles was, in actuality, a limitation on the dual disability rating that would otherwise apply to such a bilateral disability. (A43a.) Indeed, the rating enhancement provided by the schedule for the loss of two auricles was less than if both disabled auricles were rated separately. (*Id.*)

The Veterans Court thus reached precisely the opposite conclusion of what was proposed by the VA—a dual rating for bilateral disabilities is applied, unless the rating schedule otherwise expressly limits the applicable rating. (*Id.* (citing 38 C.F.R. § 4.25(b).) As a further example, the Veterans Court found that the rating schedule for retinal atrophy expressly limited bilateral disabilities to only one disability rating. (A43a-A44a.) The Veterans Court explained that without such an express limitation, other regulatory provisions, such as 38 C.F.R. § 4.25(b), would require a full dual rating. (A44a-45a.) Accordingly, because the rating table for tinnitus did not have such a limitation, the Veterans Court found that Petitioner's bilateral tinnitus disabilities should be given a full dual rating. (A46a.)

The Federal Circuit failed to even mention these findings by the Veterans Court. Instead of basing its interpretation that "tinnitus in two ears constitutes two disabilities" on a mere presumption, the Veterans Court engaged in a reasonable analysis of the VA regulatory structure that rationally supported its interpretation. Consequently, the Veterans Court's decision that "tinnitus in two ears constitutes two disabilities" was not arbitrary, capricious, an abuse of discretion, or contrary to law. That decision was fully consistent with a rational interpretation of the VA's regulations and should not have been overturned.

B. The Veterans Court Properly Construed the VA Regulations in Favor of Veterans

The rationality of the Veterans Court's decision is further supported by the application of "the rule that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-118 (1994). The Veterans Court concluded that if 38 C.F.R. § 4.25(b) is subject to any reasonable interpretative doubt, "such doubt is to be resolved in favor of the veteran." (A46a (citing *Brown v. Gardner*, 513 U.S. at 117-118; *Allen (William) v. Brown*, 7 Vet. App. 439, 446-48 (1995) (en banc); *Otero-Castro v. Principi*, 16 Vet. App. 375, 380 (2002)). Thus, the Veterans Court not only complied with *Brown*, but also with 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.303(a) in that it observed the requirement of interpreting veterans' entitlement law under a "broad and liberal interpretation."

The Federal Circuit itself concluded that "the regulations here leave in doubt whether tinnitus in each ear can be a separate disability, they are ambiguous...." (A12a.) Against that backdrop, the Veterans Court's reasonable alternative interpretation of those same regulations, resolving the ambiguities in Petitioner's favor was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. To the contrary, the Veterans Court's decision complied with this Court's precedent in *Brown*.

C. Thousands of Veterans Have Been Denied Benefits Under the Federal Circuit's Ruling

Tinnitus is a disabling disease with no known cure. *Tinnitus Quick Facts*, American Tinnitus Association. According to the American Tinnitus Association ("ATA"), tinnitus "is a condition that interferes with concentration, sleep, and job performance, and ruthlessly reduces quality of life for those who suffer severely with it." (*Id.*)

According to the ATA 339,573 veterans were awarded disability compensation for tinnitus as of fiscal year 2005, representing a 20% increase over the prior year. American Tinnitus Association, http://www.ata.org/home/vetpage.html. The ATA identifies tinnitus as the number-one reason for

veterans' claims for disability benefits. (*Id.*) Although tinnitus affects large numbers in the general population, veterans are especially susceptible to the disease as a result of their service-related activities. (*Id.*)

Accordingly, the outcome of Petitioner's case will have a significant human impact on not only the more than 6,500 veterans assisted by the VFW but also on many others who have timely claims pending for bilateral tinnitus disability benefits. Unless corrected, the Federal Circuit's erroneous decision will deny those veterans the relief for which they were entitled under the VA's own regulations.

CONCLUSION

For the foregoing reasons, the VFW respectfully requests that the Court grant the petition for *certiorari* and reverse the decision of the court below.

Respectfully submitted,

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In The

Supreme Court of the United States

ELLIS C. SMITH,

Petitioner,

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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I. Petitioner's Arguments Are Properly Before the Court

Contrary to the government's assertion, Resp. 6, 9, Petitioner has not waived his arguments. First, Petitioner specifically raised the doctrine requiring that interpretive doubt be resolved in favor of veterans at the Court of Appeals for Veterans Claims (the "Veterans Court").[1] In fact, the Veterans Court relied on that doctrine as an alternative basis for its holding. *Smith v. Nicholson,* 19 Vet. App. 63, 78 (2005) ("to the extent that there is any reasonable interpretative doubt regarding the meaning of § 4.25(b) and its application to DC 6260 . . . such doubt is to be resolved in favor of the veteran."). Second, in presenting his case to the Federal Circuit, Petitioner argued that the decision of the Veterans Court was proper and should be affirmed, regardless of the standard of review applied.[2] Because the Veterans Court decided in Petitioner's favor, it was sufficient that Petitioner argued its decision should be affirmed by rebutting arguments made by the government.

There is no legal principle requiring "incantation of particular words," but only "that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174-175 (1988)). This requirement is met in this case. Parties are not required to anticipate all of the possible bases upon which a court of appeals may decide a case. Where a court of

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[1] *Smith v. Nicholson*, 19 Vet. App. 63, 69 (2005).

[2] Petitioner's Federal Circuit Brief, 2005 WL 3738090 (Brief of Claimant-Appellee at 1, 3, 5, 6, 9, *Smith v. Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006) (No. 05-7168)).

appeals fully considers an issue, it is proper for the Court to consider that issue even if it was not raised before the court of appeals. *See Jones v. United States,* 362 U.S. 266, 272 (1960), *overruled on other grounds by U.S. v. Salvucci*, 448 U.S. 83 (1980); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

The cases cited by the government are not contrary. *Illinois v. Gates*, 459 U.S. 1028 (1982), Resp. 6, is a dissent, and hence, is not persuasive authority for the proposition for which it is cited. In addition, *Gates* is distinguishable as it is based on review of a "*factual* issue on which neither party adduced any evidence." *Id.* at 1029 (emphasis added). The government's reliance on *Tennessee v. Dunlap*, 426 U.S. 312, 316, n.3 (1976), is misplaced because in that case the Court refused to consider an issue that was not presented in the complaint, at the district court, or at the appellate court.

Neither case relied on by the government prohibits review of Petitioner's arguments. Even if not formally presented to the Federal Circuit, Petitioner's arguments still may be properly considered by this Court. For example, in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 778, 783, n.14 (1980), the Court considered an issue presented on *certiorari* by a party who, like Petitioner, had prevailed on that issue in the district court but who, because of her success at the district court, had not presented arguments on that issue to the appellate court. *See also Carlson v. Green,* 446 U.S. 14, 17, n.2 (1980). Thus, Petitioner's arguments are properly before this Court and should be considered.

II. The Federal Circuit Should Defer to the Veterans Court

According to the government, Congress "bypassed" the Veterans Court, instead making the actions of the Secretary of Veterans Affairs subject to review by the Federal Circuit.[3] Resp. 7. That argument is illogical given the congressionally mandated standards of review for both the Veterans Court and the Federal Circuit. As explained in the Brief of *Amicus Curiae* Veterans of Foreign Wars of the United States ("Brief of VFW *Amicus*"), the Federal Circuit is required to apply the same deferential standard when reviewing a direct challenge to a newly promulgated "regulation" or the Veterans Court's "interpretation thereof" when reviewing a Board decision. 38 U.S.C. § 7292. The statute prescribing review by the Veterans Court, however, does not specify the deferential standard of review for "interpretations of regulations." 38 U.S.C. § 7261. "Congress obviously could have used that or similar language to expressly require the Veterans Court to review the VA's regulatory interpretations under the deferential arbitrary and capricious standard, but it did not." VFW *Amicus* 9.

The Secretary can make the ratings schedule at will, but the Veterans Court has *exclusive* jurisdiction to review

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[3] In support of its argument the government relies on cases previously distinguished by Petitioner, Pet. 7, without providing any reasoning why the distinctions highlighted in the petition are not significant. Specifically, the government cites the discussion of *Auer v. Robbins*, 519 U.S. 452 (1997) in *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Petitioner previously explained that *Auer* is not controlling because it does not involve review of an agency interpretation by an Article I court. Pet. 7. The other cases cited by the government, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) suffer similar distinctions. Pet. 11-12.

interpretations of that schedule as applied in decisions of the Board of Veterans' Appeals. 38 U.S.C. §§ 7252, 7261; *Sellers v. Principi*, 372 F.3d 1318, 1324 (Fed. Cir. 2004). If the Veterans Court interprets the ratings schedule in a manner with which the Secretary disagrees, then the Secretary can change the schedule. *See* 38 U.S.C. §§ 1155, 7252(b). The Secretary has the authority to proscribe all necessary regulations, 38 U.S.C. § 501, and Congress has empowered the expert Veterans Court to overturn unlawful interpretations of those regulations.

This power of the Veterans Court is significant because it is an expert authority on VA regulatory interpretations, Pet. 9, a characterization not disputed by the government. The Veterans Court is an Article I court within the Executive Branch of government. Pet. 8-10. Unsure of its position,[4] the government neglects to dispute the law relied on by Petitioner, Pet. 9-10, and instead assumes "*arguendo*" that the Veterans Court falls within the Executive Branch.[5] Resp. 8. Based on that "assumption," the government relies on *Martin v. OSHRC,* 499 U.S. 144 (1991). Resp. 8-9. As stated in the Brief of VFW *Amicus*, however, "although *Martin* may suggest a presumption that an adjudicatory body, such as the Veterans

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[4] The government previously has adopted the position that an Article I court is within the Executive Branch of government. *Freytag v. C.I.R.*, 501 U.S. 868, 885 (1991) (asserting that "the Tax Court is a department" of the Executive Branch).

[5] The government also argues that, if the Article I Veterans Court is outside the Executive Branch, then it is undisputed that the agency interpretation, not that of a reviewing Article I court, is entitled to deference. Resp. 9. However, the government fails to cite any persuasive authority for this position. The government's cases easily are distinguished because, contrary to this case, they do not involve review by an Article I court created to ensure government awarded rights are protected.

Court, does not exercise interpretive lawmaking power, it nevertheless acknowledges that 'Congress is free, of course,' to delegate those powers 'as it chooses.'" VFW *Amicus* 7 (citing *Martin*, 499 U.S. at 158). Here, Congress did just that; it chose to delegate the power to make authoritative regulatory interpretations to the Veterans Court. *See* Pet. 10-13; VFW *Amicus* 7-10. Because the Veterans Court is so empowered, the Federal Circuit should have deferred to it.

III. Ambiguities in Provisions Granting Benefits to Veterans Must Be Construed in Favor of the Veteran

Not only does the government fail to provide any support for its position that the Fishgold Rule does not apply, the government fails to address Petitioner's citation to and reliance on *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-21, n.9 (1991), in which this Court suggested that application of the Fishgold Rule is broader and applies to ambiguities in "*provisions*" granting benefits to veterans. Pet. 15. The non-adversarial nature of procedures involving veterans strongly evidences Congress' intent to resolve all issues by giving the veteran the benefit of any reasonable doubt. Pet. 13. The government fails to refute Petitioner's reliance on the expressed intent of Congress. Pet. 16. As recognized in the Brief of VFW *Amicus*, because the Federal Circuit itself concluded that the regulations at issue were ambiguous, it should have interpreted those regulations in favor of Petitioner, as the Veterans Court did consistent with this Court's precedent. VFW *Amicus* 9. The government's failure to cite any persuasive authority in support of its position, and its failure to address Petitioner's arguments and supporting law demonstrates the

weakness of the government's position and the need for this Court's guidance.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to review the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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No. 06-400

In The
Supreme Court of the United States

ELLIS C. SMITH,

Petitioner,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ORGANIZATION OF VETERANS' ADVOCATES IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Petitioner Smith has consented to the filing of this brief by *amicus curiae* The National Organization of Veterans' Advocates ("NOVA"). Because the Solicitor General, Paul D. Clement, has not responded with consent in writing, NOVA hereby moves, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amicus curiae* brief in support of Petitioner.

The National Organization of Veterans' Advocates ("NOVA") is an organization of attorneys and non-attorney practitioners who devote some or all of their practice to representing those seeking benefits through the federal veterans benefits system, and in particular those seeking judicial review of denials of veterans' benefits.

NOVA's interest in this case evolves from its members' representation before the Department of Veterans Affairs of claimants who are adversely affected by the decision of the Federal Circuit in this matter concerning deference to be afforded to the VA's interpretation of statutes and regulations.

NOVA respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae National Organization of Veterans' Advocates, Inc. ("NOVA"), is an organization of attorneys and non-attorney practitioners who devote some or all of their practice to representing those seeking benefits through the federal veterans benefits system, and in particular those seeking judicial review of denials of veterans' benefits.

NOVA's interest in this case evolves from its members' representation before the Department of Veterans Affairs of claimants who are adversely affected by the decision of the Federal Circuit in this matter concerning deference to be afforded to the VA's interpretation of statutes and regulations.

SUMMARY OF THE ARGUMENT

The correct interpretation of VA statutes and regulations is critical to ensure that veterans obtain the benefits that Congress intended them to have, but the Federal Circuit did not apply the special canons of construction required by this Court for judicial review of VA statutes and regulations. The Petition of Mr. Smith affords this Court the opportunity to clarify and affirm the need for application of the special canons of construction for VA statutes and regulations.

NOVA respectfully submits that the lack of judicial review of VA statutes and regulations for 170 years requires that no deference be afforded to the VA in matters of judicial interpretation of VA statutes and regulations. Statutes and regulations affecting the VA claims adjudication process should be interpreted in the light most favorable to the claimant, resolving every reasonable doubt in favor of awarding benefits.

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[1] This brief is filed with a motion for leave. No part of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

Accordingly, NOVA supports the Petitioner in this case, and urges the Court to reverse and remand the Federal Circuit's judgment.

ARGUMENT

VA STATUTES AND REGULATIONS SHOULD BE INTERPRETED IN THE LIGHT MOST FAVORABLE TO THE CLAIMANT.

A. The Federal Circuit Held That Deference Was Required.

In reaching its decision, the Federal Circuit relied on the general rule fashioned by this Court: an agency's interpretation of its own ambiguous regulation is entitled to substantial deference. *See Smith v. Nicholson*, 451 F.3d 1344, 1349 (Fed. Cir. 2006). An agency's interpretation "is controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 32, 359 (1989)).

B. The Historical Lack of Judicial Review.

For 170 years, veterans' claims for benefits were not subject to judicial review. Lawrence B. Hagel & Michael P. Horan, *Five Years After Veterans Judicial Review Act: The VA Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 Me. L. Rev. 43, 44 (1994). The practice of providing benefits to veterans is older than the Constitution itself. In 1636, members of Plymouth Colony provided support for soldiers who suffered disabling injuries during battle with Native Americans. History of the Department of Veterans Affairs Part 1, http://www.va.gov/opa/feature/history/docs/history/history1.pdf. For a substantial part of the country's history, Congress had a direct role in administering veterans' benefits. *See* William F. Fox, Jr., *The Law of Veterans Benefits: Judicial Interpretation* 3-13 (3rd ed. 2002). In 1930, President Herbert Hoover signed Executive Order 5398 and created the Veterans Administration, which administered the program

of veterans' benefits. *See Fact Sheet*, U.S. Dep't of Veterans Affairs, Facts About the Department of Veterans Affairs (May 2006) http://www.va.gov/OPA/fact/docs/vafacts.pdf.

Veterans perceived "injustice and arbitrariness" in VA decision-making and began lobbying to change the adjudication system as early as 1952. Hagel & Horan, *Five Years After Veterans Judicial Review Act* 46 Me. L. Rev. at 44. Until 1988, a veteran could not obtain judicial review of The VA's denial of his claim. *See The Law of Veterans Benefits* at 5. The decision of The VA was final. *See* Veterans' Benefit Act of 1957, Pub. L. No. 85-56, § 211(a), 71 Stat. 83, 92 (1957). In *Johnson v. Robison* this Court held that, although the statute prohibited judicial review of the decisions of the Administrator, it did not bar judicial consideration of claims challenging the constitutionality of the statute itself. 415 U.S. 361, 367 (1974). However, this did not afford judicial review to veterans of how the VA interpreted VA statutes or regulations. In 1988 Congress recognized the need for limited judicial review and passed the Veterans' Judicial Review Act of 1988, which created the United States Court of Appeals for Veterans Claims as an Article I court. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). Thus, it was not until 1988, that judicial review was available for the interpretations made by the VA of its statutes and regulations.

C. Special Canons of Construction.

In 1946 this Court held that ambiguities in statutes providing benefits to veterans must be resolved in the veteran's favor. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). In 1991, this Court suggested that the same rule governs the resolution of ambiguities in VA regulations. *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221, n.9 (1991). In between, this Court decided *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), holding that substantial deference is given to the statutory interpretation by the agency authorized to administer the statute. Thus, a tension exists between the obligation to resolve ambiguities in favor

of veterans and the substantial deference usually afforded to interpretations by an agency authorized to administer the statute.

The Federal Circuit has gone further than *Chevron*, holding that the VA's reasonable interpretation of a statutory provision governs when the law does not directly address the precise question at issue. *Gallegos v. Principi*, 283 F.3d 1309, 1312 (Fed. Cir. 2002). In a case involving direct review by the Federal Circuit of VA rulemaking, the Federal Circuit noted:

> [I]t is a well established rule of statutory construction that when a statute is ambiguous, "interpretative doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed.2d 462 (1994); *see also, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n. 9, 112 S. Ct. 570, 116 L. Ed.2d 578 (1991) (referring to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed.Cir. 1997) ("Certainly, if there is ambiguity in the statute, interpretative doubt is to be resolved in the veteran's favor.") (internal quotations omitted).

NOVA v. Principi, 260 F.3d 1365, 1378 (Fed.Cir. 2001).

Relying on *Chevron* the Federal Circuit concluded that deference to the interpretation by the VA was required simply because the VA's interpretation was reasonable. NOVA urges that the special canons of statutory construction of ambiguous VA statutes and regulations should be applied in judicial review of any interpretation made by the VA. The special canon of construction created by this Court in *Fishgold, King*, and *Gardner* should trump the traditional principles of deference afforded to governmental agencies.

D. Problems With Deference.

The Federal Circuit's decision in this appeal demonstrates the problems inherent in affording deference to the VA when interpreting VA statutes and regulations. NOVA

supports Mr. Smith's petition because his argument would require deference to the interpretation made by the Veterans Court rather than to the interpretation by the VA. However, NOVA's view is that deference should not be afforded to either the VA or to the Veterans Court when they interpret VA statutes and regulations. Instead NOVA urges that the rule of deference is inconsistent with the special canons of construction set by this Court in *Fishgold, King*, and *Gardner*, all supra.

It took Congress 170 years to permit judicial review of VA decision-making in benefit claims. To impose upon the veteran the burden to overcome deference to the VA's interpretations undermines the long delayed right to judicial review. The paramount consideration should be interpreting VA statutes and regulations to grant "every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a) (the VA's statement of policy).

VA statutes and regulations are fundamentally different from all other statutes and regulations. These statutes and regulations were created to benefit those who bore the burden of national defense. The nation's special debt to veterans requires that ambiguities in those statutes and regulations be resolved generously in favor of the veteran, not that the agency's ancient, hand-me-down, acquired but unreviewed wisdom be protected by deference.

CONCLUSION

NOVA urges this Court to grant Mr. Smith's petition for certiorari.

Respectfully submitted,

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